UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE WIRE HARNESS SYSTEMS ANTITRUST

MDL NO. 2311

_____/

STATUS CONFERENCE / MOTION HEARINGS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan

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Detroit, Michigan
Wednesday, January 25, 2017
at about 10:00 a.m.

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(Court and Counsel present.)

THE CASE MANAGER: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

The Court calls Case No. 12-md-02311, In Re: Antitrust Litigation.

THE COURT: Good morning, everyone.

THE ATTORNEYS: (Collectively) Good morning.

THE COURT: Looks like we have a full house here today. Okay.

Let's start. Mr. Esshaki, I think you are first on the agenda.

MASTER ESSHAKI: Yes. Thank you very much, Your Honor.

I just wanted to comment that we, with respect to the motions to compel production of documents from the original equipment manufacturers, went to extraordinary lengths to craft the orders that ultimately were entered.

And I wanted to let everyone know, I have never

seen a process like that before where a plaintiff assigned a plaintiff's counsel and the defense assigned a counsel, they became a team to negotiate with a designated OEM. They negotiated and negotiated in good faith and then came back to me with matters that they could not resolve, and then through I think three days, long days of mediation, we were able to get that resolved. I -- I was absolutely astonished at the cooperation that existed not just between the opposing counsels but also counsel for the OEMs. And it was a lot of hard work, there was a lot of professionalism that was exhibited by everyone, and I was absolutely amazed at what we were able to accomplish.

Now, I am also convinced that everybody will be appealing, but that's okay.

Secondly, I mentioned this in an e-mail, the next status -- my next motion hearing date is March the 21st. I -- I am required to participate in a mandatory continuing education program in order to maintain my certification with our Supreme Court as a mediator, so I would like to move the motion date from March 21st to March 23rd, the day after the status conference. So please make a note of that and we'll -- I will have my assistant send out a notice well in advance.

But we're -- we are moving along on our motions, Your Honor. We had two of them yesterday that we have

resolved, orders will be entered today, and I think I've got a handful of motions on the -- in the jury room right now that will be coming up again. So everyone's working cooperatively and I think they are getting some results. Thank you.

THE COURT: Very good. Thank you.

Okay. So everybody knows the motion hearing date for the Master will be the day after instead of the day before at the March -- March status conference.

All right. The status report, the -- who did the status report now?

MR. HANSEL: I -- I did it with Randall Weill, my partner.

THE COURT: Thank you. I -- Mr. Hansel. I think that this is -- it is wonderful, I appreciate it. I like the status of the settlements being added to it, it makes it very helpful to the Court.

The only problem that I had on -- well, for instance, on the status of service, just as a comment to your clerk who actually does the typing, or unless you do it, I don't know, but where you list the -- the bar for the part, it is so dark you can't see the name of the part; in fact, I didn't even realize it was in there. So if you could change the coloring on that.

MR. HANSEL: We will fix that.

THE COURT: Okay.

MR. WEILL: Your Honor, and could I add that this would never have been possible without the cooperation of all counsel here. It was a gentlemanly, cooperative event and collaborative event, and we are the focus of the comments but everyone else was very, very helpful in doing this.

THE COURT: Okay. Thank you. Thank everybody because it is certainly helpful to the Court to have that summary and it's a good balance and check on our records. Thank you.

Okay. The settlements, the Court has reviewed what was in the report. Do you want to make some comments on it, anybody? Go ahead.

MR. BARRETT: Good morning, Your Honor. I'm Don Barrett for auto dealer plaintiffs.

I would like to make just a short report.

THE COURT: Okay.

MR. BARRETT: In the 39 cases which are currently pending before Your Honor, there are 67 defendant families, defendant groups. Of these 67 defendant families, the auto dealers and the end payors working together have settled with 36 of them, and Ford just within the last few days.

Of the 31 defendant families remaining, we have four mediations that are agreed to and scheduled, the first one of those beginning next week.

And then of the remaining 27 defendant families, we are in on-going settlement discussions with 17 of them, and we are at least moderately optimistic that we can be successful in at least most of those.

There are nine defendants who have blown us off, refused to respond to us.

And finally, there is one and only one defendant that we have not yet reached out to because we only started learning about this company's involvement ten days ago or so.

So we are making progress. However --

THE COURT: Mr. Barrett, can I ask you before you go on --

MR. BARRETT: Yes, ma'am.

THE COURT: -- of the 39 parts that you are talking about --

MR. BARRETT: Yes, ma'am.

THE COURT: -- I noted, of course, that some of them just came in last year. How far, how far down that list?

MR. BARRETT: I have that right here. The wire harness -- the wire harness defendants, was a bunch of them, that -- that -- wire harness is completely settled. Fuel senders are completely settled. Bearings as of very, very recently is completely settled, and we are happy to announce that to the Court.

THE COURT: That must be relatively brand new, right?

MR. BARRETT: Yes, ma'am. And when I say settled, some of them we are still working on the language of the settlement agreements, but they haven't been presented for preliminary approval but they will, surely they will be in -- in -- pretty quickly.

THE COURT: Okay.

MR. BARRETT: Motor generators is finished. Steering angle sensors is finished. Inverters is finished. Airflow meters is finished. Electronic throttle bodies is finished. Interior trim products is finished. Alternators is finished as well. And several others, like IPCs, there is only one defendant remaining. Heater control panels there is only one defendant remaining. Ignition coils, one defendant. HID ballast, one defendant. So -- fan motors, one defendant. So we have a lot of them that are on the cusp of being done, and -- and we are in discussions with most of these single remaining defendants.

THE COURT: And you, I know, represent auto dealers. Are you -- are these also resolved with the end payors? I noticed most of them went together but --

MR. BARRETT: I don't speak for the end payors, but yes.

THE COURT: I see we are going to get an update

right now.

MS. SALZMAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. SALZMAN: Hollis Salzman.

Yes, this is the same -- virtually the same statistics for the end payor class as well.

THE COURT: Thank you.

MR. BARRETT: Your Honor, we understand that -- that -- that you are considering -- considering naming a mediator and --

THE COURT: Well, wait a minute. Now, that's -- we are -- we can go right into that now because that's the next issue, but let's finish up with the settlements.

MR. BARRETT: Oh, okay. All right. Thank you.

THE COURT: Okay.

MR. KANNER: Good morning, Your Honor.

THE COURT: Good morning.

MR. KANNER: Steve Kanner on behalf of direct purchaser plaintiffs.

We do have a number of settlements which are pending. I believe Your Honor has the motion for preliminary approval for Yazaki and Chiyoda, those are combined, and for Sumitomo. Sumitomo's contains wire harness and heater control panels. Yazaki includes wire harness, instrument panel clusters and fuel senders.

Addition -- in addition, I think you have already granted the preliminary approval motion for Furukawa, again on wire harness.

And I will announce, but somewhat vaguely, and you will understand why, that we are close to an agreement in principle with yet another defendant both in wire harness and multiple cases, and by the time of the next status appearing, I expect the motion for preliminary approval will be on file.

And that leaves us with just --

THE COURT: That what?

MR. KANNER: That leaves us with just -- will leave us with just a couple two defendants in wire harness. We are talking with multiple defendants in the bearings cases. We haven't scheduled any mediation. However, we will leave that to the next point of discussion, Your Honor.

THE COURT: Okay.

MR. KANNER: Thank you very much.

THE COURT: Thank you.

Yes, sir.

MR. SHOTZBARGER: Good morning, Your Honor. William Shotzbarger on behalf of the truck and equipment dealer plaintiffs.

THE COURT: Okay.

MR. SHOTZBARGER: As far as the status of our settlements, we are only in six cases. Wire harnesses is

completely settled.

The next case is bearings. We are happy to report that we have reached a settlement with SKF USA. That brings us to four out of the six bearings defendant families that are settled.

The next case, occupant safety systems, we have one defendant family left.

And then we are also in the radiators, starters and alternators cases.

But that is the extent of our involvement in these cases, and we are happy to report that new settlement that did not appear in the status report.

THE COURT: Thank you. Thank you.

Okay. Let's -- let's talk now about court-ordered facilitation, and I am not -- I'm not talking about the fact that the Court is going to say who does the facilitation. I would like for you to do that if we get to that point, for you to make suggestions. But you are doing -- you are doing well on a lot of these. I think the indirects, of course, are -- are moving along.

But I am very interested now -- and I -- I will first listen to what you have, but I'm -- I'm telling you I'm very interested in seeing what can happen now actually while we are in this process of class cert and, most importantly, the OEM discovery. So let me hear what you have to say and

then we will talk about it.

All right. Mr. Hansel, are you speaking or Mr. Barrett, who's going -- I guess Mr. Barrett's got the mic first, so go ahead.

MR. BARRETT: Your Honor, very briefly, as the Court knows, we first suggested -- the auto dealers first suggested this back in September. We continue to support that idea. One, the numbers. We have worked hard and we do work hard, and -- and it is all I do is this case, and I work 10 to 12 hours a day on it, and we have managed to settle 36 and -- but that's been what, five years? What does that mean? Another -- for the remaining 30 or 40 percent, does that mean another three years? And all lawyers to some degree are procrastinators. Having judicial intervention in the form of mediation ordered and overseen by Your Honor will hold everybody's feet to the fire, the plaintiffs and defendants alike. And that's -- so we support it.

THE COURT: Okay. So you support this. Okay.

MR. HANSEL: Your Honor, Greg Hansel for the direct purchasers.

After the Court placed this agenda item on the agenda, the direct purchasers, the end payors, the auto dealers and the truck and equipment dealers got together to discuss whether we could make a common comment on this agenda item for the Court, and I'm here to try to deliver that on --

on behalf of the four class plaintiff groups.

First, we want to thank the Court for helping this process along. The Court has -- has promoted settlement from early on, and I think all the parties appreciate that.

We have a list of suggested court-appointed facilitators that we would like to share with the Court since that was an agenda item. We came up with this list for the Court's consideration. I will list the four names on our list.

THE COURT: All right.

MR. HANSEL: Chief Judge Gerald Rosen.

THE COURT: Oh, he's done this month, isn't he?

MR. HANSEL: I understand he's --

THE COURT: He's done the end of January.

MR. HANSEL: -- he's expected to retire.

THE COURT: Okay. He had his party so I know, yes, this would be -- he's done. Okay.

MR. HANSEL: We have not discussed this list with the defendants, just for the Court's information, yeah.

THE COURT: Okay.

MR. HANSEL: Ken Feinberg, who is a well-known mediator and has been involved in this case for some parties successfully. Former Judge Daniel Weinstein has also been involved. And former U.S. Magistrate Judge Mort Denlow is well known to many of the attorneys in the case; he's from

Chicago.

THE COURT: Okay. I'm not familiar with him.

MR. HANSEL: In addition to the names, the class plaintiffs had three other comments, really suggestions to the Court, requests of how this might be structured to promote settlement best.

First, as the Court is aware, there has been significant success in bilateral negotiations without a mediator. So if negotiating parties agree to negotiate directly without a mediator, we suggest they be permitted to do so. But if one of the parties to the negotiation concludes that it is either not moving forward or the negotiations are at an impasse, we would suggest that that party be able to report that to the court-appointed mediator, and then the mediator would -- would mediate from then on that particular matter. That's our first suggestion.

The second one is that if the parties have already agreed on a mediator, that they be permitted to continue to work with the agreed mediator. As Mr. Barrett said a few moments ago, there are several mediations scheduled already with mediators that have been agreed to by the plaintiffs and the defendants in certain matters. So why -- you know, if it ain't broke, don't fix it. That sounds like it is on a good track.

And then finally, in light of the numerous parts

and parties here, if -- if a court-appointed facilitator feels that it would be helpful to expedite settlement to appoint other JAMS mediators to support the effort because it is so far-flung, that we suggest that the court-appointed facilitator be empowered to do that.

Thank you, Your Honor.

THE COURT: Okay.

MR. REISS: Good morning, Your Honor.

THE COURT: I'm glad to hear the other side now. Okay.

MR. REISS: Yes. Steve Reiss. I represent Bridgestone defendants in the AVRP case and the Calsonic Kansei defendants in the radiators and air conditioning and ATF warmer cases.

Your Honor, I -- I will just agree. I am not sure I am authorized to speak on behalf of all of the defendants. I think a number of the defendants have the -- the views that I'm -- I'm about to express, and -- and -- and they are really in agreement with what Your Honor has said and a couple of the things that Mr. Hansel just said, which is, one, if there are going to be mediations, we do think it critical that the parties be able to, if they can agree, choose their own mediator. My experience, if both sides have confidence in a mediator, that is a very, very important factor in helping the success of the mediator. And Your

Honor has indicated that, Mr. Hansel has suggested that, and we would certainly agree if there are going to be mediations, the parties should certainly be able to appoint their mediator if they are able to do that.

THE COURT: Okay.

MR. NICOUD: Good morning, Your Honor. Tre Nicoud. I represent the Mitsuba defendants who are defendants in nine different groups of cases.

So like Mr. Reiss, I don't think I'm authorized to speak for other defendants, but we also largely agree with what was just said. I think the only slight modification that I would propose is there may be circumstances where sequencing of which group of plaintiffs of the process goes forward. It may make sense that one goes forwards rather than the other.

I have certainly had other cases where, after discussions with opposing counsel, we both conclude, frankly, that now is not the right time to involve a mediator. Something needs to happen in the case for both sides to have a better view of how things should go forward. And while we are certainly happy, if we are ordered, to participate in the mediation process, we will certainly do that. But in those types of circumstances, frankly, where the parties need a development in the case in order to better inform their views, it helps to have the case go forward and not be

ordered to go do something that, frankly, has an extremely low chance of success and may even be a waste of the mediator's times.

But -- but that would be the only caveat I would offer. Everything else I thought made perfect sense.

THE COURT: Okay. Thank you.

Any of the other defendants have any other comments?

(No response.)

THE COURT: No. Okay. No comment, Mr. Cherry?

MR. REISS: Well, now that you've asked.

MR. CHERRY: Your Honor, I was trying --

THE COURT: It makes me nervous when you're quiet.

MR. CHERRY: I think, you know, if Your Honor feels strongly that the parties ought to attempt mediation, you know, we can agree to do that. I think, as Mr. Hansel pointed out though, I think the parties ought to try to have discussions on their own and see if a mediator is necessary and, if necessary, try to agree on a mediator on their own. We from our own experience have found that for mediation to be successful, it is really important for the parties to have a say in who the mediator is and for the parties, and particularly the parties themselves, the clients, to have confidence in a mediator, and so I think it is important that we chose our own. Thank you.

THE COURT: Did you consider who you wanted? I mean if you are going to choose your own, who are you going to choose?

MR. CHERRY: Well, Your Honor, I think there are mediators that have been used by the parties in getting some of the settlements to date. They may include some of the ones that were mentioned. I think there are others that we are familiar with. We weren't aware that -- that the plaintiffs were going to be submitting a list. I think if you wanted a few names from the defendants, we could do that by tomorrow or this evening, but we -- we weren't prepared to submit that.

THE COURT: Okay.

MR. CHERRY: Thank you.

THE COURT: Any other defendant? Any other comments from plaintiffs?

(No response.)

THE COURT: Okay. Well, I'm very pleased to hear that some of you have used mediators or facilitators. Those words are used differently in different parts of the country and in different circumstances. I call it a facilitative mediation, not anything near where you are dictated or you have penalties or any of those kind of things, but that you, both sides, have an opportunity to present to a person, or there may be multiple mediators for different parties, that

you have an opportunity to present your case and work out a resolution.

I think it is very critical here. I feel very strongly because I know all of the pleadings may not be in. I can't remember how much of it I read. Like on the -- there were just objections to the OEMs. That's a massive undertaking, that's a massive undertaking. And if you are going to settle this case, I think it -- you know, I'm going to have that go on, we are going to continue with our hearings I believe, but -- but I think that if there is a way of resolving it first, we have to do everything to explore what there is out there to try and resolve the case.

I want -- I think there can be multiple facilitators, and I have absolutely no problem, those of you who are using facilitators, and I think one facilitator probably would not be able to resolve this and he or she would have to bring in other people. But to me, it needs to be organized. I know we have, you know, so many different parts and they are out there floating, but -- and the indirects are doing very -- I think are doing very well, and I don't want to interfere with what is going on with the indirects, I want you to continue to do what you are doing. As to the directs, I'm hearing -- you know, I know that we have a settlement today and we have some -- some more in the works, so you are also moving along.

I guess for both sides, I mean for both parties, I just want you to do it faster, I want you to do it now, and I think that somebody has to be in control of that. I think we need a master facilitator. So I would like to appoint a facilitator who would take over all of the facilitation with these provisos:

That that facilitator get himself or herself advised as to what all of the parties are doing. And if you are using other facilitators and have used them, I want you to continue. This would be the multiple -- the other facilitator. I want you to consider and continue with that. So this master facilitator would not only be the facilitator, he would kind of be the administrator of facilitations so -- so that he can keep track, or she -- I think I only have four female -- four males' names -- but so that he can keep track of what is going on and see if there needs to be a further push in the facilitation. And so he really would be over all of the facilitation, though I'm going to ask him to -- to focus more right now on the directs so that the plaintiffs -- the indirects could continue with who they have.

Now, who is this going to be? Defendant says they haven't had time. I have four names. I know -- the four names from plaintiff, let me just comment on those. I don't know Mort Denlow. I know Dan Wein -- by reputation only, Ken Feinberg and Dan Weinstine (sic) and -- Weinstein. They have

great reputations, they've done extremely well. They charge a lot of money. I'm -- I'm concerned about trying to keep the cost down. I mean even though you have a lot of money, you've got a lot of people, we have a lot of -- of people to take that money from what we have already in our settlements.

So I would like -- I mean, this will be up to you if you want to do this. Judge Rosen is starting out. I -- if you decide on Judge Rosen, I am not the one to decide on -- on the payment of any of these people, do you understand? You are going to have to decide how much -- if you come to an impasse, obviously I will have to do that, but I prefer not to get involved in -- in that.

Judge Rosen is just starting out, so you may work very, very hard, I have no idea. You said he's going with -- or maybe I heard this. Somebody mentioned JAMS, and I -- I think that's who Judge Rosen is going with, or I read about that in the paper. I don't know anything about that group either so that's something that you have to consider. But I want to do this now, I want to do it now.

So I don't know whether any of these people or other people that defendants may have would be willing to take on this job, so I would like to give you some time to discuss this today, today. So let's just go on with the rest of the agenda and then we are going to come back to this, and I'm going to give you time because I -- I'm so serious about

this, I want it to move forward, so whoever gets it, whoever this would be, let's do it today.

All right. The next item is the stay of discovery. Does anybody have any comments on that?

MR. REISS: Yes, Your Honor.

THE COURT: A lot of people. We have a whole presentation here. I don't know if you are for or against.

MR. REISS: Against.

THE COURT: My inkling is not to stay anything because I want to move this along.

MR. REISS: No, Your Honor. And let me start by saying I'm here as counsel for Bridgestone in the AVRP case.

THE COURT: Who is your other client, Mr. Reiss?

MR. REISS: Calsonic Kansei; they are in later cases.

But I'm here, I'm standing here for Bridgestone in the AVRP case, and I'm also -- also authorized to tell the Court that the views that I'm going to express also are the views of the remaining defendant in the EPP and ADP cases and the AVRP case.

And just to lay the big picture, Your Honor, as Your Honor has pointed out, all of the defendants in the other two lead three cases have settled the indirect purchaser cases, so the wire harness case and the bearings case are completely settled with respect to the indirect

purchasers, not with the direct purchasers but the indirect purchasers.

That means that the AVRP case is the lead case with respect to the indirect purchaser actions. And as I said, there are two of the four defendants in that case. Bridgestone and Toyo are the remaining defendants. And I think it is important to give the Court the whole picture of where we are in those cases and -- and how frankly dysfunctional in those case -- in -- in the AVRP case, I'm not speaking for any other case, in the AVRP case, how dysfunctional a stay would be.

And just some very brief overview points.

THE COURT: Okay. You are saying how dysfunctional it would be?

MR. REISS: Yes.

THE COURT: Okay.

MR. REISS: Just, as the Court well knows, the burden of the indirect purchasers is to prove that the AVRP defendants caused an overcharge on AVRP to the OEMs, and second, that any overcharge that the OEM suffered, if there was one, was passed on throughout the manufacturing process where the AVRPs are combined with about 30,000 other parts, and then through the sales process where there in this Court are two levels of indirect purchasers passed onto, first, the ADPs, and second, from the ADPs to the EPPs, and this is

critical, Your Honor.

On the current record, and it is an extensive record, on the current record before this Court, the AVRP defendants sold only to Japanese OEMs: Toyota, Nissan, Honda and Subaru.

THE COURT: Okay. But we are not here on a motion to --

MR. REISS: No, no, no, Your Honor, but this -- this explains the discovery situation. Right now there is no evidence of pass-on with -- between -- by the Japanese OEMs, and here is how we know that. Here is what the Japanese OEMs have each said in sworn declarations submitted to this Court.

Toyota, the prices of specific auto parts are not considered in setting the MSRP.

Honda -- Your Honor, Tre asked -- I don't know if this has to be highly confidential. These -- I honestly don't know the answer to that and --

MS. ROMANENKO: Your Honor, I think the OEMs who gave a deposition would take issue with their statements being made public.

MR. REISS: These were declarations submitted in pleadings, but I guess we could look at that.

MS. ROMANENKO: I think the declarations were also designated as highly confidential.

THE COURT: So what do you want to say?

MR. REISS: Well, I -- I -- I think we can mark this -- I don't know if the Court wants to see if there is anyone in the audience who should not be in the audience.

THE COURT: Is there anyone here who is not an attorney on this case or associate? Well, we've got a couple of bystanders here. Okay. Three of you.

What is highly confidential about this?

MR. REISS: I don't know, Your Honor.

MR. NICOUD: Your Honor, Tre Nicoud for the Mitsuba defendants.

I raise this only because, as you will hear in connection with objections and appeals regarding some of the OEM discovery orders, the OEMs are very sensitive about their information, and I want to strive that we are respectful of their claims of confidentiality. I may not agree with them, but unless we have challenged them formally, I want to honor their claims, and I -- my recollection is that these were designated highly confidential by them.

MS. SALZMAN: So, Your Honor, so I think that, you know, all of the parties that have signed the confidentiality agreement are -- are responsible for keeping this information not disclosed to the public at this time. So putting aside the fact whether this is appropriate argument on the motion to stay, which is -- I don't think it is, I don't feel comfortable having non-lawyers in the case present while

non-parties' statements may be disclosed, whether appropriate or not.

THE COURT: All right. While we are talking about the OEMs' statements, since I haven't ruled on them and since there is much in the OEMs that is, the Court is aware, highly confidential, I'm going to ask those people who are not attorneys on the case to step out while we have this --

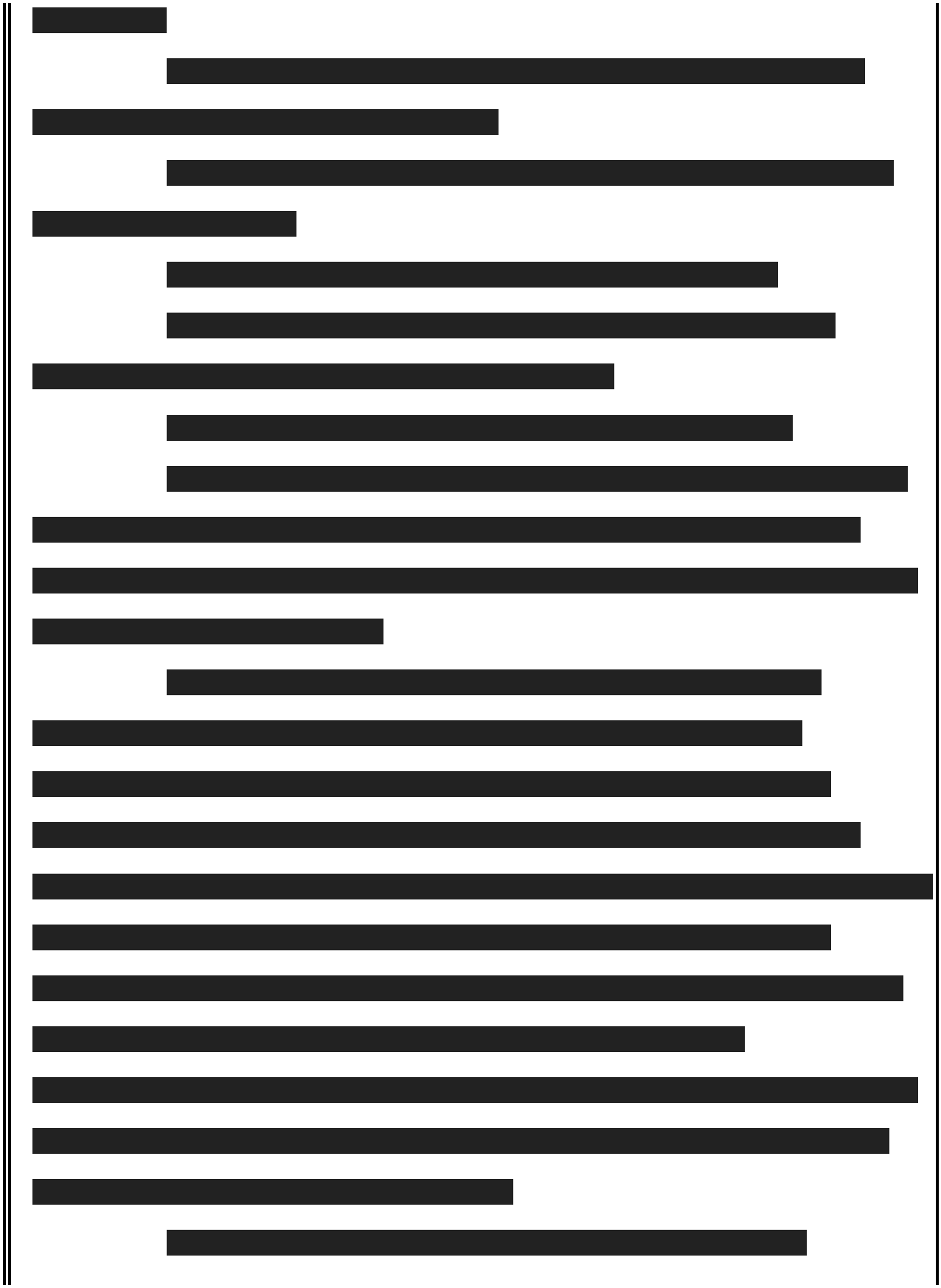
MR. REISS: This part, Your Honor, will be literally 30 seconds.

THE COURT: Thirty seconds, okay. Don't go too far.

And on the record, this is confidential. It should be marked as such, this portion right now. Okay.

(Non-designated parties were excused from the courtroom for the following confidential proceedings:

[redacted]



[redacted]

(Confidential proceedings concluded; previously excused parties re-entered the courtroom.)

THE COURT: We will go back on the public record now.

MR. REISS: So, Your Honor, we are in the middle of an extraordinary, extensive, time-consuming process on OEM discovery. The OEMs have produced their DOJ materials and the OEMs have started collecting their documents and data for

production.

And I will tell Your Honor, with respect to the OEMs involved in the AVRP case, none of those four Japanese OEMs have objected to the scope of production. Okay. So they haven't -- there may be issues about who -- who pays what costs and there may be some confidentiality issues, and I understand that, but none of those four Japanese OEMs have objected to the scope of the productions. And --

THE COURT: So is that going forward? Will you get that information then from those four?

MR. REISS: I believe we will, I believe we will.

And here -- here I think is the critical point here. So this is like we spent two years training, working hard, doing all sorts of things. We finally get to the meet, we finally get in the stadium, we're finally all positioned at the starting blocks. After those two years of hard, hard training and work, you can't call off the race just about when the gun is about to go off, and here is why we can't.

Obtaining the OEM productions and -- and closing discovery with respect to the OEMs would first, as our view, I'm sure the plaintiffs will differ but we need the evidence, it is going to support the OEMs' specific motions for summary judgment, which we are confident we will be able to make, if only Nissan's sake.

And second -- and I think this is really important

for the Court given the Court's desire to move these cases and, if possible, settle these cases. Candidly, this discovery -- staying discovery, staying this discovery is not going to help certain clients settle because they will say, well, the OEMs all say they didn't pass on any overcharges. Even if there were overcharges, they all say they didn't pass on any overcharges. Doesn't that mean that we win the IPP cases? Yes, that's a fair question, Your Honor, that's a fair question. And those of us who have clients who are raising those questions have to answer them. And it is not a good answer for us to say, well, you know, that may be, but we are going to take a indefinite time out to see if we can settle these cases. I think Your Honor is much, much more likely to accomplish your goal of achieving and prompting settlements, if they are possible, by continuing discovery.

And now just -- just there's some equities here too, and I think the next slide is important. Again, now, this is just for the AVRP defendants. We have been through for the last several years massive discovery, massive discovery. We have had three years of fact discovery. We've produced -- Bridgestone has produced almost 9 million pages of documents. There have been other -- other millions of documents produced by the other defendants. There have been over 200 -- 200 depositions taken with respect to the AVRP case.

And our discovery is almost complete. We have completed the production of core documents, we have responded to numerous, numerous, numerous interrogatories and requests for admissions, and all of the notice depositions in this -- of the defendants have been either completed or scheduled. And, Your Honor, I will tell you, as I stand here today, there is a deposition in my office in New York of a Bridgestone employee who has travelled from Japan to be deposed with two other Bridgestone litigants. That is taking place literally as we speak. So there is -- we are 95-plus percent through massive discovery in the AVRP case.

Next slide. And -- and here is why, Your Honor -- I have to say this -- staying discovery now creates an imbalanced record, not fair to us. Why do I say that? Well, all of the pending discovery issues are issues about defendants' discovery, frankly, of the -- of the ADPs, right? We have an outstanding motion on general ledger DMS data, and I think Your Honor will recall, I think, that I argued that motion in October. That -- that is fully briefed and it's pending.

There are motions with respect to rebates and incentives and also deal files. The wire harness defendants have made that motion. Your Honor ruled it moot because the IPP cases were all settled in wire harnesses. We've refiled that request because it relates to all of our cases, so that

motion is pending.

And finally, we filed a motion to compel an answer to interrogatories we have asked the ADPs concerning their data preservation. We have a very good-faith basis for believing that as we speak at least some, if not many, maybe even all, of the ADPs are not taking steps to preserve their DMS data that we think is critical. And if that's true, to stay discovery, we have an ongoing issue of losing data that we think is important, maybe critical to our case.

So that's why in the AVRP case, we think it is essential that the OEM discovery goes forward. We think it essential that the discovery be completed so that we can have more informed, more intelligent conversations with our clients about settlement. I think it will help settlement.

And I must say, Your Honor, finally, I -- that it is -- we are in an odd situation to begin with in discussing a stay because no party has moved for a stay; certainly the defendants haven't and the plaintiffs haven't. Now, they may have reason to stay, they may say, oh, we think it is a good idea, maybe they will not say that, but no party has moved for a stay, certainly not in the AVRP case.

So I say, Your Honor, for all of those reasons, we think a stay of discovery with respect to AVRP would be counterproductive both in terms of the massive efforts that the parties have made and been subjected to so far and,

frankly, might even be kind of counterproductive in terms of achieving the Court's goal of seeing if we can reach a settlement resolution. Thank you.

THE COURT: Okay. Thank you.

MR. CHERRY: Your Honor, Steve Cherry from Wilmer Hale representing the Denso defendants.

And we also oppose any type of stay. I would point out two issues. One, in wire harnesses, we are even further along. We completed discovery last September. We have summary judgment motions pending. We have agreed that our reply brief, the Denso reply brief, would be filed February 13th. We would hope that we could have it argued shortly after that, maybe late February, early March, and we think that will dispose of the case, and that should not be stayed for anything.

And we also have -- six of the cases against us are subject to binding arbitration agreements, and there are two motions before Your Honor. One is an agreed-upon stipulation to dismiss one of the cases because it is subject to arbitration. Another was opposed and we have argued that and are waiting for a disposition. And there are four others we need to discuss and maybe we can tee them up by consent, maybe we'll have an opposed motion, but we should go forward with that.

THE COURT: Okay.

MR. CHERRY: Thank you, Your Honor.

MS. KAFELE: Good morning, Your Honor, Heather Kafele on behalf of the JTEKT defendants, and I'm also speaking on behalf of the bearings defendants as well.

I just wanted to -- we also oppose a stay of discovery. I wanted to point out a few unique issues in our case that are going on. First of all, as I think you heard before, all -- there are six defendants in our case. We have all settled the EPP and ADP cases.

Nobody, none -- none of the defendants have settled the DPP cases. We have currently a schedule in place. Discovery is going to end on March 20th. Plaintiffs are going -- or the DPPs are going to be filing their class cert brief on March 20th. That means that by the time we come here next time to see you, Your Honor, at the status conference, we are going to have the first class cert motion on file after five-plus years. There is a lot of work that's gone in to get to that point.

And if you remember, I think it was in November, the DPPs actually came before you and said we want to extend our class cert schedule five months, we need more time, there is so much to do, so many documents, so much discovery. And Your Honor decided that issue just on December 19th, a little more than a month ago, and said no, no, no, I'm going to keep you to the schedule, we are not going have any more

extensions of deadlines already set. And I think -- and what's happened, that's kept the -- the wheels running. A lot has been going on and those deadlines are really effective.

Just to give you some insight, Your Honor, as to what's been happening, the bearings defendants have produced 100 million pages of documents. Twenty depositions have already occurred of the parties, 40 more are scheduled in the next seven weeks. That's a deposition a day I think. Thirty of those 40 people are flying in from Japan overseas, there's tickets bought, executives have cleared their schedules, there are translators hired. It is complicated. Putting the brakes on that right now, Your Honor, is going to significantly prejudice us, the defendants, and, frankly, I think the plaintiffs as well. All of that work is going -- it's not like we can stop it, restart it in a few months. It is complicated.

And I also think there is a bigger point too. There is a lot of momentum in our case right now, and that momentum, even by a pause in putting things on ice for a short period of time, is going to change. And I think that momentum is really what you are looking for, whether it is to get a decision made or it is to facilitate settlement. And I would just urge you to keep those deadlines going because it is working, it is working. And we're -- you know, it has

been five years. Our clients are eager to get a decision or to get more insight into this, and the only way to do it is by keep -- keep the process going, Your Honor.

THE COURT: All right. Thank you.

MS. STORK: Good morning, Your Honor. I'm Anita Stork and I represent the Keihin defendants in one of the later filed cases, the fuel injection system cases, which were filed number 22 in sequence.

Keihin also strongly opposes a stay of discovery. If, as one of the plaintiffs' lawyers from the DPP side said, you want to hold people's feet to the fire to achieve a settlement, it should be in parallel, we strongly think, with discovery moving forward because there are just many clients who just don't see the need to get serious about settlement and, quite frankly, can't even assess the risk of moving forward with the case versus settling until there is discovery.

There is also equity issues. The plaintiffs are alleging conduct that took place ten years ago. Couple that with the fact that the fuel injection systems case has been pending for two years, you've got a 12-year gap. Witnesses' memories fade, witnesses become available (sic). Keihin did not plead guilty, they strongly want to contest liability. And they, the clients, are very strong of the opinion that they have got a due process right to litigate this case and

try it if necessary in a reasonable period of time.

We have no objection to court-ordered mediation, but we do think that in order for it to be most effective, there needs to be parallel discovery going on to really and truly hold people's feet to the fire.

THE COURT: Okay. I'm taking defendants as saying they don't want any stay. Did I hear that right? Okay.

Do you have anything that hasn't been said?

MR. NICOUD: Your Honor, Tre Nicoud again for the Mitsuba defendants.

One, I would want to make sure that, at least for us, we reinforce our strong opposition to this stay is not linked in any way and does not in any way suggest opposition to working with facilitative mediation or whatever process.

THE COURT: Okay. Good.

MR. NICOUD: Those are -- those are separate issues. But -- but we are -- really are strongly opposed to a stay. And like Ms. Stork who spoke on behalf of the Keihin defendants, we are a little differently situated than those defendants who have been in some of the earlier cases. For us, what is as big an issue as anything else is we aren't being given the opportunity to adjudicate our defenses. We have effectively been living under a stay for three years. Unlike the other cases where lots has been going on, we are just waiting at the station; we haven't even gotten on a

train yet. And the -- what we really, really would hate to see and what would prejudice unfairly is to have these cases stop and not be moving forward.

THE COURT: All right. Thank you.

Mr. Fink.

MR. FINK: As long as there is no more -- no more defendants who want to say no.

Your Honor, this is a very interesting question and we start, I think, with the issue of what is the -- the purpose of the -- of a discovery stay or another kind of stay. And we are presuming that the purpose is to facilitate settlement and to control costs so that funds can go toward the effort towards settlement and efforts can go toward settlement rather, and we think that's laudable.

That said, there are certain things the defendants have said that we agree with completely, particularly with respect to bearings. It is absolutely correct that for the next several weeks we have a massive amount of discovery that is scheduled, by cooperation, but an awful lot of effort is necessary to get to that point. A lot of expenses are incurred that can't be refunded and can't be avoided and would end up being duplicated. If -- if a stay was entered now, we would have to incur those costs again. And those costs aren't simply the financial costs, although those are significant, and the travel arrangements, et cetera, but you

have the -- the amount of time that was involved to coordinate all the schedules that had to be coordinated, and -- and that's going to be going at a very fast pace for the next several weeks, and we -- we really are in complete agreement.

It is also important to us because in the bearings case, this is our opportunity to get some information that's very important to us as plaintiffs, as the direct purchaser plaintiffs, to -- to learn some things that we think will actually help us get to settlement.

That said, there are circumstances and there are no doubt are circumstances in the current cases where a stay of certain aspects of the case could and likely would promote a resolution of the case, promote settlement of the case.

And -- and one thing we would suggest is if the Court, in fact, is going to select a settlement master, that settlement master will be -- after he or she gets an understanding of -- of the massive number of issues that are involved here, that settlement master would probably be in the best position to recommend to the Court what type of stay or what type of matters could be stayed that would promote settlement. We have the problem of the law of unintended consequences, and certain of these issues, if we -- a stay today of discovery or a broad stay might actually interfere with settlement rather than promote it and add costs rather

than reduce them.

Now, there is another issue though that we -- that nobody has raised or talked about. I guess it is because the -- the agenda says discovery stay on it. There is another type of stay that, in fact, we think could be -- the direct purchaser plaintiffs, and I speak only for the direct purchaser plaintiffs --

THE COURT: Bar you from filing any more cases?

MR. KANNER: Let's not get carried away, Your Honor.

MR. FINK: Got so close, Your Honor, so close.

The direct purchaser plaintiffs -- I have no good comeback to that. The direct -- the direct -- the direct purchaser plaintiffs would point out to the Court that very frequently the way that settlement is facilitated is by the continuation of certain uncertainty and risk for both parties.

So, for example, and it is not just an example because it gets right to the heart of what we are looking at, there are pending dispositive motions in the wire harness case. One party will win, presumably win, and one party will presumably lose. That uncertainty -- or lose in part and win in part. The presence of that uncertainty creates an opportunity for settlement, it always does.

And so later today when we talk about the

scheduling of those particular motions, we are actually going to suggest that perhaps those motions or consideration of those motions should be stayed during the settlement process to the extent that it is coordinated by a settlement master who may well then say to the Court, no, no, no, it is time to move forward with this, let's go ahead with these motions.

But for now, we are concerned that we may lose a settlement opportunity if dispositive motions are decided. And there are other motions pending in a couple of other cases. We don't think they should be decided during the time that these -- that the Court wants to have that process.

I would also point out that we -- as we heard from counsel in the bearings case, there is a tremendous amount of work that is going to be necessary between now and March 20th for the filing by the direct purchaser plaintiffs of the motion for class certification. And much as we have all looked forward to that, once we file that motion, if that is then held in abeyance during settlement discussions, the defendants get a tremendous opportunity and a tremendous advantage because they can use that time to sit on that motion, work on that motion while we are in a closet in some room negotiating with a facilitator.

So, Your Honor, I -- I -- excuse the shift in perspective here from the question that was asked by the Court, which was about -- of course about discovery,

regarding discovery. At least with bearings, I think we have unanimity on this side of the bench on -- on the bearings question, but -- discovery question, but we would present -- and we have not discussed with any of the defendants the -- the possibility of holding any of the pending motions in abeyance. It really came to us as we were sitting here and discussing this today. So I don't know what the defendants' position would be on that. But we hope the Court would consider that we think the stay of those -- of any pending dispositive motions if a matter is in mediation would be a very constructive step.

And on the other hand, as far as discovery, we are very concerned about bearings discovery.

THE COURT: Okay.

MR. FINK: Thank you, Your Honor. I don't speak for the indirects.

MS. SALZMAN: Good morning, Your Honor.

On behalf of the end payors, the end payors would not like to see a stay in the case and for a couple of reasons. Number one is we are going to be very focused in the coming months on mediating the cases, hopefully resolving the cases with defendants. We need that discovery, number one, to be on equal footing with the defendants to know the strengths and weaknesses of our case so that when we get into the mediation, we can negotiate based upon the real evidence

in the case, and that is especially true for the later filed cases where we have virtually no discovery yet from those defendants.

And the second is a more practical reason is everyone does better under pressure, and if you take that pressure off the parties, it -- it may disturb the -- the process.

A possible -- if the Court is looking for some relief on discovery, a possibility would be to stay the OEM discovery, these are non-parties, allow the -- allow the actual parties to this -- this case continue with the party discovery, try to mediate and settle, and then see what we need from the OEMs without, you know, continuing with that discovery. Perhaps Your Honor would like to resolve the motions and then stay the discovery given that it is fresh in everyone's mind at this point, but that is just an option that I throw out there.

THE COURT: Okay.

MS. SALZMAN: And then just finally, I would be remiss in not saying that Mr. Reiss said that perhaps we would disagree with his assertions on the passthrough based on OEM affidavits, those affidavits that were submitted solely for the purpose of narrowing discovery. So I just want to say of course we do disagree with that and we have evidence and experts that would say otherwise. Thank you.

THE COURT: All right. You know, let -- let me just indicate to you, I put this stay of discovery on here in anticipation of somebody, once we discussed facilitation, bringing it up and I wanted everybody to be prepared to -- to do it. I did not mean to imply, because as I said in the beginning of this discussion, that there would be a stay. I just want to know what your opinion is. I can always be convinced one way or the other. I'm not, you know, in favor of a stay either, so --

MR. FINK: In that case, Your Honor, never mind.

MS. SALZMAN: Thank you.

THE COURT: Okay.

MS. ROMANENKO: Good morning, Your Honor. Victoria Romanenko for the dealership plaintiffs.

Your Honor, the dealership plaintiffs do agree that a stay of discovery is the most appropriate process in order to facilitate settlement discussions. Some of the defendants and I guess a few of the plaintiffs have said while we need more discovery, we need to learn more about the case, the indirect purchasers, including the auto dealers, have settled with defendants in the earlier cases and in the later cases, the majority of cases, the majority of defendants, in fact.

The stage of the case hasn't been a problem. We've -- we've settled -- we settled with one big defendant in 2014. You know, all of these other defendants have

managed to settle the case based on everything they have learned so far from the last three and a half years of discovery: the hundreds of depositions and the millions of pages of documents, including DOJ documents and plaintiff documents that have been produced so far. So we don't see why it is a problem somehow for these other defendants, the minority of defendants, to settle the case at this juncture after we have been going for five and a half years and have expended all of these millions of dollars when it was not a problem for their predecessor.

I think the real question -- the real question isn't can we get a little more here, can we get a little more there. If we do another year of this, are we going to -- is a light going to go off and we're going to say Eureka, 60 million, we are done? The real question is what are the terms on which the parties are willing to settle? The real issue is getting the parties into a room together, and we think that a discovery stay in conjunction with facilitative mediation will do that. The nature of litigators is they want to keep fighting, they want to keep arguing, they want to see what else they can get, what -- what -- what point can I grab here, what piece of discovery can I grab there?

THE COURT: Not that they want to keep billing?

MS. ROMANENKO: I -- I think as far as this case is concerned, they -- they seem to want to keep going. But, you

know, I think -- I think keeping discovery going of course enures to that. There are -- everybody is going to be focused on discovery fights if we keep discovery going, and they are going to say why should I settle now when maybe in a year I can have a big discovery victory and that that will somehow knock it down millions of dollars for me? And that's -- you know, that process can go on, it could go on for ten years. If this case were permitted to do so, I think it could do so.

I think if Your Honor is interested in seeing settlement and seeing some real progress towards it, if -- taking a shot at it, using our mediator's time to our advantage, I think we need to give it our full attention. I think we need a stay in place.

Mr. Reiss and some of the other folks talked about everything that has happened so far. We have had many rounds of mediation, we have had hundreds of depositions, we have had folks preparing for depositions to fly out. Yes, that's consumed a lot of resources, and we are on the cusp of an expenditure of a lot more, especially if we -- this OEM discovery is supposed to get going, especially if we keep going with the -- more -- more depositions, more productions.

Your Honor has an opportunity to conserve party resources, non-party resources and judicial resources. At this juncture Your Honor has the ability to decide that tens

of millions of dollars in five years is enough at least to temporarily see if we can focus our attention on reaching settlements rather than continuing to fight to see what other points we can grab.

And, Your Honor, I'm sure you're -- you are familiar with the law on this, but just to give you a very quick review of what --

THE COURT: Probably not. Go ahead.

MS. ROMANENKO: -- of what we found, but for instance, as stated in the case Nellcor Puritan Bennet vs. CIS Medical Systems and here in the Eastern District of Michigan, courts have inherent power to manage their dockets and stay proceedings. And there have been a number of courts within the Eastern District of Michigan that have -- and within the Sixth Circuit that have exercised their authority to stay discovery while the parties negotiate a settlement or worked on mediation.

So just to give you a few examples, Continental --

THE COURT: No, no, I know I have authority to do that.

MS. ROMANENKO: Okay.

THE COURT: I'm not concerned with that. Thank you.

MS. ROMANENKO: Okay. So --

THE COURT: Anyway, by the time you appeal, this

will all be --

MS. ROMANENKO: So there -- there -- there -- there have been a number of cases where -- where judges, other judges within this district have done the same thing because it is -- they go hand in hand. It is customary, if the judge wants the parties to get serious about trying to settle the case, to stay discovery so that they will focus their efforts on that.

And just a few examples are Continental Casualty Company vs. Harsha here in the Eastern District, Judge Berg imposed a stay while the parties conducted mediation. Giasson Aerospace vs. RCO Engineering, also in this district, Judge Cleland stayed discovery while the parties conducted settlement negotiations. Cequent Performance Products vs. Hopkins, also here in the Eastern District, Judge Leitman stayed discovery while the parties engaged in mediation. SMA Portfolio Owners vs. Corporex, a case within the Sixth Circuit, Judge Bunning stayed discovery for six months pending court-ordered mediation, so similar situation to here.

And what a lot of these courts have recognized is that a stay is an important tool for facilitating that mediation and focusing the parties' efforts on resolving the case. A discovery stay removes all of these other distractions. You know, we heard I think from some folks

that we need to be working on our class cert motion or, you know, we need to be briefing this motion to compel that is has come in, so that's going to be focused on that litigation instead of focusing on settlement.

And the point, the -- the message that a discovery stay sends is we want you to focus on settlement, especially because if the process works how it is supposed to work, and it sounds like everyone believes that it will work, it is going to render all of that discovery moot, all of that hard work, all of those hours and hours. So why would the parties expend all of this time and money fighting motions to compel, filing motions to compel, serving new discovery requests, loading productions, reviewing productions, doing predictive coding, redacting productions, having privilege log fights, why would they do that when the case might resolve and render all of that moot? The point is we want to conserve party and judicial resources if there is not going to be any point in taking on all of this additional discovery and discovery fights.

And the other thing is, I think as we talked about a little bit earlier, the discovery stay is a very important mechanism for removing the parties from their adversarial positions so that they can work cooperatively. Right now we are -- we're in the middle of litigation discovery fights. The parties are -- are positioned to fight, not to

necessarily say -- you know, as I think as Mr. Reiss said, not -- not to say forget it, let's talk about settlement.

In addition, I think as we have heard both from the OEMs and some of the parties, there are a number of documents that are extremely sensitive, that are -- that -- that folks are very concerned about having produced. If we have a stay of discovery, if we say we are not going to work on that now, we are going to work on mediation, that business risk can be averted.

THE COURT: Okay.

MS. ROMANENKO: So -- and Your Honor, we're not -- no one's trying to avoid discovery. We think there has been a lot of discovery in this MDL. Discovery has been going for three and a half years, and that is about three to six -- three to six times the six to 12 months that Your Honor's practice guidelines say should be devoted to a complex case.

So I think we have had more than enough discovery. Anybody can think of more information that they might want, but do we need it? No. I think the majority of the settlements have demonstrated that we don't need it. There have been hundreds of depositions taken already, there have been millions of pages produced. The fact that the majority of defendants in this case have settled and the increasing number of mediations scheduled indicates to us that there will be settlements that are going to moot the discovery

efforts, so the burden of engaging in all of these productions should not be incurred.

THE COURT: All right. Thank you.

MS. ROMANENKO: Thank you.

MR. REISS: Your Honor, three quick points. First, it is obvious that the overwhelming consensus of the parties other than the ADPs is not to stay discovery, and my strong suspicion is the cases that -- in the cases that Ms. Romanenko read off to you, I suspect the parties did not oppose a stay; here they do.

Second, with respect to Ms. Salzman's comments, it would make no sense to let all discovery go forward other than the OEM discovery because that's certainly something that the defendants for very good reason view as critical.

And finally, I think that this slide says it all. Ms. Romanenko says, well, we don't need any more discovery. Well, this slide says exactly why we do need more discovery, and this is the snapshot of why ADPs don't want any more discovery. It is all discovery we want from them that they don't want to produce for pretty understandable reasons.

THE COURT: Okay. Are you going give us copies of this? Are you going to give us copies of this?

MR. REISS: Yes, I did, Your Honor.

THE COURT: Okay.

MR. REISS: Thank you.

THE COURT: I don't need it. I just wanted to make sure you had. Okay.

MR. SHOTZBARGER: William Shotzbarger on behalf of the truck and equipment dealer plaintiffs.

We certainly see both sides. You know, the auto dealers are proponents of the stay. Those arguments resonate with us as well as the directs and the defendants and the end payors as well. I think we as the truck dealers would be for the stay.

THE COURT: Okay.

MR. SHOTZBARGER: Thank you.

THE COURT: I don't need a lot more. I'm ready to rule.

MR. NICOUD: Your Honor, all -- all I would like to do is -- and again, Tre Nicoud for the Mitsuba defendants.

Ms. Romanenko was citing some cases to you. I would like to just reference one other for you. It is the Sixth Circuit considering a petition for a writ of mandamus and vacating a district court's entry of a stay. And in language that we think is particularly applicable to defendants in the later filed cases and to Mitsuba, in our many cases where we have been waiting, what the Sixth Circuit said in finding that entry of a stay was an abuse of discussion is that a court must tread carefully in granting a stay of proceedings since a party has a right to

determination of its rights and liabilities without undue delay, and that's 565 F.2d 393, and I will search for the page reference. But I would urge the Court to consider that -- that case as well as the ones Ms. Romanenko cited.

MS. KAFELE: Your Honor, Heather Kafele on behalf of the bearings defendants.

One very quick point. It sounds like on the DPP bearings case, the parties are in agreement that discovery should be stayed. I just wanted to respond to the one point about the idea of -- or not stayed, sorry. Gosh, oh my God.

THE COURT: You are changing your position there.

MS. KAFELE: Oh, no. I just wanted to make sure they were listening and it worked. Okay.

MR. REISS: Half the people fainted so you got -- you got your reaction.

MS. KAFELE: I'm not getting appointed again by my group. Okay.

Well, anyway, I wanted to respond to the suggestion that we let discovery go but we somehow hold in abeyance the class cert motion and the idea that the discovery is going to keep pressure on and we don't need to do the motion and await a decision. I would say it is exactly the opposite, Your Honor. The idea that you are -- you're -- not just that you're doing discovery for the sake of discovery but that you are going to actually have the risk of a decision, that

decision and that risk of the decision and the idea that it might be eminent next year, that is what is going to create the motivation.

So taking that off the table, I don't want to do discovery just for the sake of discovery. I want to actually get some clarity or feel like I'm going to have the risk of that clarity. That's what I take back to my clients. So I would just suggest that that idea is going to be -- have the opposite effect.

The last point is, you know, Rule 23(c) does give us a right to not just file a class cert brief but to get a decision in a -- you know, early as practical. It is five years going. Holding that in abeyance any longer is just not -- not warranted.

MR. CHERRY: Your Honor, just to pick up on one other point that was made by the direct purchaser plaintiffs. As -- as I made clear, Denso and the other defendants in the wire harness case oppose any stay and, in particular, as to pending substantive motions. We completed -- we went through everything in this case. We spent a lot of time and --

THE COURT: Yes, we have -- we have already said it so let's not keep going.

MR. CHERRY: Yes. And we -- we really would like to get a decision on our motion.

THE COURT: Okay. Thank you.

MS. ROMANENKO: Just to respond specifically to the three motions that Mr. Reiss had up on the screen, the majority of those were filed Monday night right on the eve of discovery. So why was there this flurry? Because they knew that Your Honor wanted to talk about the stay, not because there is any urgency. The -- the one set of requests -- actually both sets of requests were -- were served a while ago. Impasse had been reached weeks ago on even the most recent ones.

So I think what we will get if we keep going with discovery is 30 cases worth of defendants wanting to do duplicative motions; maybe I will win, maybe I will get something. So I think it is going to enure to more fighting, not to focus on the mediation.

THE COURT: Okay.

MR. KANNER: Your Honor, Steve Kanner for direct purchaser plaintiffs.

And a final word on the issue of --

THE COURT: You get the final word.

MR. KANNER: Oh, I'm going to try at least. It is a rare -- it's a rare event.

The reality is a well-known judge in Philadelphia upon beginning of trial in a case sent us out for mediation, and as plaintiffs we wanted to know why; we were ready to roll. The judge said the sword of Damocles only works when

it is still hanging above your head; once it's come down, there is very little incentive. And that's what I will leave you on.

THE COURT: Okay. All right. Very interesting discussion, and no, I don't have a motion before me to rule on.

But in considering this, and I have given it much thought, this case is so -- I can't even imagine how you all keep track of what you and your clients are doing. I just see so many wheels going at one time. I appreciate the discovery that is set up and how it might be interfered with if the Court stays it.

I haven't been convinced. I think there are good arguments why to stay discovery, there are, but I'm not convinced that in this particular case, and I certainly recognize my authority to do it, but in this particular case I am not going to interfere with the discovery. We are going to proceed on all of the timelines that we have. There will be a master appointed and working with you. There may come a time when there will be a motion for a stay because of where you are with -- with the facilitator. So at this point I am not going to enter any stays. We are going to continue on the same timeline that we have.

And I want to know, who is reading those 100 million pieces of paper?

MASTER ESSHAKI: Your Honor, I read a lot of them.

THE COURT: You are. Let's talk about the hearing dates for objections. We have three of them. The objections to the Master's order compelling production of the documents, that's the OEMs, I think the due date for that just passed as I've seen it, January 18th, and that's what's down here, yeah, it's January 18th, and the order granting the motion for Delphi compliance with the subpoena, and the TED objection to the order granting in part defendants' motion. Okay.

MR. WILLIAMS: Your Honor, Steve Williams on behalf of the end payors.

I'm only here to address the first item which concerns the OEM discovery, and if I could add a little bit more to it. Since the agenda went in, I believe that about ten orders have been entered, and as to those ten orders, there are a few objections. All briefing on those should be completed no later than February 20th. That was as to the last order concerning Honda.

We have been in touch with some of the OEMs. We understand that they would be available on the next status conference we have with Your Honor, which I believe is on the 22nd of March. I'm not speaking for defendants and they may want an earlier date, but it does seem to me, unless any of the OEM counsel here in the room have any updated

information, that at least we know that date would work for a hearing as to all of the OEM objections that may come in. And I should say none of the plaintiffs have objected to any of those orders.

THE COURT: Okay. Thank you.

MR. HEMLOCK: Good morning, Your Honor. Adam Hemlock, Weil, Gotshal & Manges, on behalf of the Bridgestone defendants.

Regarding the OEM discovery, we believe Mr. Williams is correct that the briefing will be completed by February 20th. We would respectfully ask for an earlier hearing date. It may not make a huge difference, but as we discussed earlier and as you heard, the process is going on so long, we think that the OEM discovery is critical. The sooner that we can resolve the ongoing disputes and just get the production going, the better. We would be happy to confer with the other parties and the OEMs to figure out a date that works, but something in between February 20th and the next status conference we think would be useful. It may be, you know, a meaningful number of issues to address as well and it might be worthwhile to do that at a separate hearing.

THE COURT: You know what? I'm going to read these OEMs. I don't think I need oral argument. If after reading them I think I do need oral argument, then I will give you a

date and we'll set -- or we will coordinate with you, of course, so you could have the OEMs here, but at this point I think they are just going it be done on briefs.

MR. HEMLOCK: Okay. Thank you, Your Honor.

THE COURT: Okay. Anything else?

MR. GANGNES: Your Honor, Larry Gangnes speaking on behalf of the Furukawa defendants this morning.

With respect to the hearing date on Delphi's objections to the Master's order, the subpoena that is the subject of that order was issued on July 29. The Master's order enforcing it was entered on October 24, 2016. The briefing was completed on Delphi's objections on November 14, 2016. We think the Court can decide the objections on the basis of the briefing, but if the Court wants to have a hearing, we would suggest that it be held at the next status conference on March 22nd.

THE COURT: Okay. We will notify you if there is going to be a hearing at the status conference. Otherwise it will just be done on briefs.

MR. GANGNES: Thank you, Your Honor.

THE COURT: Okay. Thank you very much.

Any problem with TED?

MR. SHOTZBARGER: Your Honor, with regard to item 3, the truck and equipment dealer plaintiffs' objection to the Special Master's order, we spoke with the defendants

and we wrote to Ms. Doaks last week that both sides are willing to submit that dispute on the papers.

THE COURT: Thank you very much. Okay.

Then let's go back because -- oops, all right. Are we done with the hearing date on the objections? You weren't going to speak to that.

Okay. I want to go back to the status of the sealing orders and compliance with Shane. Mr. Cherry?

MR. CHERRY: Yes. So, Your Honor, the parties have exchanged drafts of proposed stipulations to try to deal with the issue. We are very close. We hope to talk early next week and hopefully come to a conclusion. And we have discussed perhaps agreeing to a date, I think you said February 10th --

MR. SELTZER: Yes, yes.

MR. CHERRY: -- where if we haven't come to a resolution, we would just submit our -- whatever areas of dispute there are to the Court for a decision.

THE COURT: Okay.

MR. SELTZER: And yes, Your Honor, we would submit a joint stipulation setting forth any positions of the parties if there is anything left unresolved to be decided, and we would submit that either to Your Honor or to Special Master Esshaki, whichever you think is best.

THE COURT: Okay.

MR. CHERRY: And Your Honor, it will address how to deal with materials that have already been filed as well as materials going forward, although the parties have been dealing with this. I know the defendants will be filing motions here very shortly dealing with materials already filed and what should or should not remain sealed and laying out the basis for it. And I -- I would note that things that have been filed recently have been on motion, you know, laying out the basis for Your Honor's decisions.

THE COURT: Okay.

MR. SELTZER: And the matters to be unsealed, for example, include various of the complaints that were filed in large -- they will be unsealed in large part.

THE COURT: All right. I -- I think you can give -- if you have a problem, submit those directly to the Court. I'm anxious to get this part of it done and an order entered.

MR. CHERRY: Thank you, Your honor.

MR. SELTZER: Very well, Your Honor.

MS. SULLIVAN: Good morning, Your Honor. Marguerite Sullivan from Latham & Watkins on behalf of the Sumitomo defendants.

As Mr. Cherry noted, certain of the wire harness defendants plan to file a motion to seal previously filed materials, and we have -- we will agree to unseal the vast

majority of the materials that have already been filed under seal, but there are a select number of documents that we would like to move to keep under seal. And we would like the Court's guidance with respect to a subset of those materials which are the documents for which we are only requesting partial sealing. What we would like to do is submit proposed redactions to the Court for in-camera review rather than filing them again on the public docket.

THE COURT: I think that would be fine.

MS. SULLIVAN: If that is acceptable. Thank you, Your Honor.

THE COURT: I think that would be fine, just so they're already there anyway.

MS. SULLIVAN: Thank you.

THE COURT: Okay. All right. Now we are going to the wire harness. Okay.

MR. CHERRY: Your Honor, we -- it is our motion.

MR. FINK: Yeah, it's your motion, speak first.

MR. CHERRY: We -- we would just -- we just --

THE COURT: You are just asking for a hearing date, right?

MR. CHERRY: That's all. And -- and, Your Honor, we have discussed and agreed that we would submit our reply brief before February 13th, and so really anytime after that.

THE COURT: Can we do it after the -- after the

status conference on the 22nd?

MR. FINK: That -- that's what we would propose, Your Honor. I'm sorry, that's -- that's what -- that we were going to go propose.

MR. CHERRY: We are happy to do it at the status conference, we are happy to do it sooner. There is just a particular week where my son is getting married I would ask that we not do it, but the status conference would be fine.

MR. FINK: Your Honor, I would like the record to reflect that I was not invited to that wedding, and that day works perfectly for me.

MR. REISS: Everyone else here was.

THE COURT: Sorry, Mr. Fink. All right. Let's -- let's put it on March 22nd. I think that's an appropriate date. Sometimes we get a lot of motions and maybe we would have to move it up, but we will call you for your son's wedding date.

MR. CHERRY: Thank you, Your Honor.

THE COURT: Okay. All right. But right now we will plan on -- on March 22nd.

Furukawa's?

MR. GANGNES: Your Honor, Larry Gangnes again for the Furukawa defendants.

We've spoken with Mr. Fink, and the Court may recall that you just entered a stipulated order --

THE COURT: I did.

MR. GANGNES: -- providing that the direct-purchaser plaintiffs' opposition to Furukawa's motion for summary judgment will be filed on March 1.

We suggest then that at the March 22 status conference we again talk with the Court about a hearing date for that motion after we have seen the opposition and we have a date for Furukawa's reply brief.

MR. FINK: Assuming they still want to go forward with the motion after they see our response.

THE COURT: Okay. We don't have a date for the reply. I was going to set it in the middle of March in order to get it on, but if you want to wait, you could have more time for the reply.

MR. GANGNES: Yes. They've had -- they will have had three months to respond to our motion. We would like to at least to see what they come up with on their opposition before we establish a date for the reply.

THE COURT: Okay. Let's -- let's put that on for the next agenda then, okay, in March.

MR. GANGNES: Thank you, Your Honor.

THE COURT: So we will need a reply date and hearing date --

MR. FINK: Thank you, Your Honor.

THE COURT: -- if the reply is not filed by then.

MR. FINK: We will try to agree on a reply date before that date.

THE COURT: Okay. All right. The next status conference is March 22nd, and then the one after that is June 7th at 10:00. I take it those dates are still okay? And then I was thinking of setting -- not during the summer, of course, but the September conference, September 13th, Wednesday, September 13th. Is there anything going on then or any date?

(No response.)

MASTER ESSHAKI: With my motion hearing on the 12th, Your Honor?

THE COURT: Yes. I don't know if you all heard that. Then Mr. Esshaki's motion date will be the day before that, the 12th.

Okay. All right. Then we're ready to start our motion hearing but let's take a break. I want you to talk about facilitators while you are on break, make good use of this. We will take 20 minutes.

MS. STORK: Your Honor, Anita Stork.

Is the Court contemplating having another group discussion about the facilitator sometime later today? Because if so, there are a number of counsel here that are not involved in the motions to be argued later, and so for that group of counsel, it would definitely be much more

convenient to have the facilitation discussion, if we are to do that as a group, before oral argument.

THE COURT: Okay. We will do it when we resume, all right, before the motions. Do you think you need more time? Let's talk about this because, you know, we could break -- we could break for lunch and come back in an hour if you need an hour.

MR. HANSEL: Your Honor, I assume the defendants may want to confer among themselves and then confer with the plaintiffs, but I think it makes sense to do it before lunch if possible.

THE COURT: I would like to.

MR. HANSEL: People have flights.

MR. REISS: Your Honor, I -- I -- I -- I agree with that, with -- with Mr. Hansel. I would -- I would think if you give us 20 -- 20 minutes, I mean we are going to have to corral a lot of folks to talk about this, but I think maybe we can use that 20 minutes --

THE COURT: See what you can do.

MR. REISS: Yeah.

THE COURT: Let's see what happens. We will meet again in a few minutes.

THE LAW CLERK: All rise. Court is in recess.

(Court recessed at 11:36 a.m.)

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(Court reconvened at 11:58 a.m.; Court, Counsel and all parties present.)

THE LAW CLERK: All rise. Court is again in session.

THE COURT: Okay. You want to discuss the master? Who is going to do that? Mr. Cherry?

MR. CHERRY: Yes, Your Honor. So --

THE COURT: Mr. Seltzer, Mr. Hansel, everybody is up here. All right.

MR. SELTZER: Yes.

MR. CHERRY: So we had some concern that we didn't -- we haven't had an opportunity to discuss names with our clients or to do some research on them or to check on their availability. And so what we have discussed among the parties is, and I think we agree, to come back to Your Honor -- to -- to submit by a week from today either an agreed-upon name or some -- our counter-suggestions for Your Honor to choose. We think that if we work together on this, we can come to an agreement on someone that we would like -- that we would mutually like to use as a facilitator.

MR. SELTZER: And, Your Honor, for the plaintiffs, we would agree to that procedure. If -- if for some reason we can't agree upon a particular individual to be the proposed facilitator, then we would submit alternatives for Your Honor's consideration.

MR. HANSEL: I would only add, Your Honor -- Greg Hansel for the direct purchasers -- that the person who you select or on whom we may agree would -- would be sort of the settlement master or facilitator but would also be able to permit the parties to -- to mediate with other mediators who they may agree on.

THE COURT: I -- I think that that's exactly right. He's to -- to permit the parties to proceed with the facilitators that they have already been using, and he's also to be able to pull in another -- other facilitators as he sees necessary with the consent of the parties or else brought before the Court.

Was there one other thing that we were thinking?

MR. REISS: Your Honor, the one thing I would add to what Mr. Cherry said is we will do our best to check on the availability of these people.

THE COURT: Well, I was just going ask you that. I want you to contact them -- there's two things: one, their availability, and I'm talking about immediate. I don't -- I'm -- not a month from now.

MR. REISS: No, no, no. I think as part of the process we envision, it would be exactly that, Your Honor.

THE COURT: Okay.

MR. CHERRY: Immediately and continuing.

THE COURT: So I will give you one week to submit

the name, but I would anticipate appointing that person that -- the day I get it. And I want you to determine the -- the fees. I don't want to get into -- I don't know what they are; I mean I hear stories. But I have not appointed somebody like that so I don't want to get into --

MR. HANSEL: We should be able to get a volume discount, Your Honor.

THE COURT: You should.

MR. SELTZER: I -- I think we can work it out, Your Honor. We -- we have been very successful in reaching agreement on fees of the mediators that the parties have selected in the past.

THE COURT: Okay. So you will discuss that and then put that in -- either you select one person and so that's all I need to know, or you put the little resumés and what everybody's fees are, et cetera in the -- the list. I am hoping that you can come up with a person to -- for the Court.

MR. HANSEL: Thanks, Your Honor.

THE COURT: So this is -- this is Wednesday, so by next Wednesday, that's February 1st, right, that would be a good way to start the month. Okay. All right. Thank you very much.

MR. HANSEL: Thank you.

THE COURT: Thank you.

MR. CHERRY: And -- and -- and, Your Honor, I -- one additional point. Just going back to the date of the hearing on the summary judgment motion in the wire harnesses case, we had -- Your Honor had set it on the -- March 22nd.

THE COURT: Right.

MR. CHERRY: It actually occurred to me my son's wedding is that Saturday, that weekend, the 18th. And I wondered, given the time for prep, if it might be possible to do it the following week. And I know Mr. Fink has agreed to that, that that worked for him if it works for Your Honor.

MR. FINK: Yes. And it was just a coincidence that I then got invited to the wedding.

THE COURT: Let me -- let me see what that week is.

MR. CHERRY: So the week of the 27th I guess, Your Honor.

THE COURT: Okay. The 22nd is the --

THE LAW CLERK: The 27th, the week of the 27th.

THE COURT: Yeah, okay. Thank you. Have to see what else we have here.

(Brief pause)

We don't have a trial that date, so let -- let -- how about March 28th at 10:00?

MR. CHERRY: That -- that -- that's -- that would be fine with us, Your Honor.

THE COURT: Okay.

MR. FINK: That works for us too.

MR. CHERRY: 10:00 a.m. Thank you, Your Honor.

MR. FINK: Thank you, Your Honor.

THE COURT: Okay. All right. With that, I think we are ready to go into our motions. Anybody who wants to leave can leave, except me.

(Brief pause)

Okay. We have a 2:00 wire harness, but I think the next thing is the body sealing products, number one, D-1, defendant Green Tokai.

MR. SHOTZBARGER: Your Honor, if I may just raise one point before we commence the motion hearings.

THE COURT: Okay.

MR. SHOTZBARGER: For the truck and equipment dealers, as it stands as of this morning, we are the only indirect plaintiff left in the bearings case. The end payor plaintiffs previously filed a motion to extend the class cert deadlines. The truck and equipment dealers joined in that motion. I understand that Your Honor issued an order that is tough to -- tough to read and tough to understand in that it refers to the end payors' class cert deadline. However, the truck and equipment dealers' deadline is not specifically addressed. That order is at dash-503 ECF No. 230.

And so I would just like to raise the truck and equipment dealers' request to extend the class cert deadline

in the bearings case. I have spoken with the two bearings defendants that are left in that -- in our case. They do not oppose the request. And in light of the status of OEM discovery as it stands now, not only are objections still being lodged, productions really have not fully begun.

In addition to that, the way it shook out is that the truck and equipment OEMs are kind of at the back of the queue in that we went ahead with the lead six, but out of those lead six, really only Honda and GM manufacture vehicles that are part of the truck and equipment dealers' case.

THE COURT: Why don't you file your own motion that so I could study it before I rule on it.

MR. SHOTZBARGER: Will do. Thank you.

THE COURT: Okay. Thank you.

Are we ready?

MR. LOVE: Body sealings.

THE COURT: Yes. May I have your appearance, please?

MR. LOVE: Yes. This is Brad Love of Barnes & Thornburg on behalf of Defendant Green Tokai Company in the body sealings case.

We filed the -- one of the motions to dismiss that's on the agenda for the hearing today. I -- I believe that the Nishikawa defendants joined that motion as well, but I will be arguing it for Green Tokai today.

The -- the basis --

THE COURT: Let me ask you a question. Does Green in the Green Tokai name have anything to do with environmental issues?

MR. LOVE: Actually no. It is a former Cleveland Brown-turned-auto-supplier entrepreneur, Ernie Green, who played in the NFL for a while and then got into the -- the auto parts market, and it was originally a joint company formed by Ernie Green and a Japanese supplier.

THE COURT: Thank you. I was just curious.

MR. LOVE: So the -- the basis for Green Tokai's motion in the body sealings case is that there is no plausible link between plaintiffs' purchases, and this is specifically the indirect purchaser plaintiffs, the auto dealers and the end payors, and the alleged conspiracy in their complaint with respect to body sealings. Plaintiffs in both of their complaints have alleged that the defendants and any named alleged co-conspirators, unnamed or named, sold to only three Japanese-based OEMs: Honda, Subaru and Toyota. And there are no allegations in the complaints that the plaintiffs purchased automobiles manufactured by those Japanese-based OEMs, and there is no allegations that any of the defendants or alleged co-conspirators sold to other -- sold body sealings to other OEMs, either U.S. based, European based, Japanese based, besides Honda, Subaru and Toyota. So

therefore, there is not a sufficient basis for the plaintiffs to --

THE COURT: You talking about brand of vehicle?

MR. LOVE: Yeah, brand of vehicle, OEM, manufacturer of vehicle. There is not a sufficient basis for the -- the plaintiffs -- the inference that they seek, which is that every new vehicle sold in the U.S. manufactured by every OEM was somehow impacted by this body sealings conspiracy that has been alleged in the complaints.

The -- the -- the four tactics that plaintiffs take in their opposition to avoid this conclusion are first to ignore the actual allegations in the complaint and this Court's prior rulings on the motions to consolidate and suggest that they somehow alleged an industrywide conspiracy that affected all OEMs, and that simply is not the case and is inconsistent with the prior rulings in these consolidated cases.

Second, they incorrectly claim that their allegations are the same as those that this Court has found sufficient in other claimed conspiracies involving other suppliers, other OEMs, and other facts that are not alleged in -- in their complaint, and -- and that's certainly not the case for -- for the reasons we laid out in our briefing and I will summarize briefly here.

THE COURT: You -- you also talked about how 16 of

them weren't authorized to purchase from the OEMs. What are you talking about there? Sixteen --

MR. LOVE: The -- some of the ADPs, yes. There are 16 of the auto dealer plaintiffs --

THE COURT: Right.

MR. LOVE: -- who specifically allege that they are not dealers that can purchase from Honda, Subaru or Toyota, and therefore the -- the facts as alleged actually disprove any link between their purchases and the -- the conspiracy allegations; not just the conspiracy allegations in the complaint but the allegations as to who the defendants and alleged co-conspirators sold body sealings to. Again, there is no allegation in either complaint that defendants or the alleged co-conspirators sold to any U.S.-based OEMs or European-based OEMs like GM, Ford, Chrysler, Fiat, Volkswagen. The -- the only allegations are with respect to Honda, Subaru and Toyota.

The third tactic they take, which I think can be quickly dismissed with, is suggesting that they aren't -- they aren't required to allege that they purchased vehicles manufactured by the defendants or their co-conspirators' customers or otherwise impacted by the specific conspiracy they have alleged in this case. They don't cite any authority for that. And the authority that we put forward in our briefs clearly states that that link is -- is required

both under Twombly to have a plausible claim and a basis for the claim and under Article III standing.

And lastly, fourth, they put forward this straw man argument that Green Tokai is relying on matters outside of their pleadings with respect to this motion. It is very clear from our briefing that we only rely on our pleadings, that's all we cite; we don't submit any of the consolidated discovery. So that is just a complete non-sequitur with respect to this motion.

Turning back to the claim of an industrywide conspiracy, I want to address that in a little more detail just because I think it is so important to the disposition of this motion. Throughout their opposition plaintiffs repeatedly claim that they have alleged this industrywide conspiracy affecting all OEMs as they put it. That's -- there are no cites to their complaint, there is nothing in their complaint that make those allegations, and as I previously mentioned, Your Honor has found those claims implausible in the prior cases. So not only are there no facts to support it, the law in this case and new decisions that came out in April of last year state that those such claims are implausible.

Specifically I'm going to quote from Your Honor's ruling in the instrument panel clusters case which applied to numerous other cases, Docket 202-162 at page 9, specifically

finding that much broader allegations in those proposed consolidated complaints support the DOJ's assessment that the conspiracies are multiple, separate and product specific.

And there is no basis, certainly based on the complaints that the indirect purchaser plaintiffs have put forward, for a different conclusion here. There are no allegations of deals between makers of different component parts, no inference of knowledge, no allegations that there was any competition on different parts between the defendants in this case, and those are all the factors that determine that such a industrywide conspiracy was implausible on the motion to consolidate.

I -- I also note that plaintiffs don't identify any specific factual allegations in their complaints in their opposition. Instead they rely on the vagueness with which they have pled the allegations in their complaint. They say that because they have prefaced certain facts with language like for example or such as or et cetera, rather than including additional facts, because they have said it very vaguely and left themselves some wiggle room, that they somehow pled something broader, and that -- that simply doesn't stand under Twombly. Under Twombly, plaintiffs' claims must be evaluated based on the specific facts alleged, not based on whether plaintiffs have somehow artfully crafted their complaints with enough ambiguity to leave open the

possibility that there are additional facts.

And then we have to look to the four corners of the complaint, and that's really the -- the key difference between this motion and the prior motions in these cases. Here only allegations are with respect to Honda, Subaru and Toyota and that's with respect to any defendants or alleged co-conspirators. Those are the only sales that have been put forward, the only customers that have been identified. Unlike occupant safety systems on which plaintiffs rely, there is no allegation that defendants dominated the market and there is no allegations of any sales to non-Japanese OEMs.

THE COURT: We have one guilty plea though in this body part, right, Nishi --

MR. LOVE: Correct, yes.

THE COURT: Nishikawa?

MR. LOVE: Yeah, Green Tokai is -- is actively defending itself in the District Court for the Southern District of Ohio in Cincinnati. A trial date has not been set, but -- but certainly contesting the -- the allegations put forward by the government there. I can let Nishikawa speak to any guilty pleas that have come in in that criminal matter.

And the -- the -- the assumption that they can somehow leave open the possibility of additional facts, you

know, this is, as -- as plaintiffs point out, the 34th case that has come up in these MDL proceedings. If there was some sort of valid basis for a wide-ranging conspiracy impacting every OEM as the plaintiffs have alleged, they would have found it by now, but they have put no such evidence or specific factual allegations in their complaint, you know, eight years in, five years in to this proceeding, against my client, Defendant Green Tokai. And therefore, under Twombly and the Article III requirements, they are missing the link that would connect their purchases to any allegations of sales by my -- my client, Green Tokai, or other defendants or alleged co-conspirators in the case.

THE COURT: Isn't -- isn't it plausible though, I mean -- this isn't a summary judgment. Isn't it plausible that there is a component-wide conspiracy here? I mean we do have a -- a plea.

MR. LOVE: I -- I -- I would agree that I think you are right to separate out the question of a component-wide conspiracy versus an -- the industry-wide conspiracy that plaintiffs appear to be relying on because that's been found to be implausible already and there's certainly no facts to support it.

With respect to the component-wide conspiracy, that is not what plaintiffs have alleged in their complaint. I think one of the clearest examples is paragraph 89 of the EPP

complaint, and even there they -- they attempt to identify what they are talking about with OEMs and how OEMs purchase directly from defendants. They -- they incorrectly state in their opposition brief that that paragraph supports the claim that the OEMs also purchase from tier one suppliers. If you look at that paragraph, paragraph 89 of the EPP complaint, it has no such allegation. But even with respect to the direct purchases that they identify in that paragraph, the only three OEMs identified are these three Japanese-based OEMs and that is Honda, Subaru and Toyota.

THE COURT: The only three what? I'm sorry.

MR. LOVE: The only three OEMs they identify as directly purchasing from any defendant or co-conspirator in paragraph 89 is Honda, Subaru and Toyota. And again, they couch that with language such as or et cetera, but those are the only specific factual allegations made in the complaint. And Twombly requires, for plausibility, specific facts to be alleged, not just basing your claims on for example or et cetera or including but not limited to. The -- the actual facts you are alleging have to be put forward in the complaint and that is what is required.

THE COURT: Well, but we know if somebody conspires, they had to conspire with someone. There can't just be one part -- one manufacturer in the -- in the part, right, or there wouldn't be a conspiracy?

MR. LOVE: Oh, correct. Plaintiffs have again brought claims against Nishikawa defendants and Defendant Green Tokai and they -- they also allege unnamed co-conspirators. But again, grouping all of those together, the only direct or indirect sales that plaintiffs identify in their complaint, the only purchasers of these allegedly impacted parts or potentially impacted parts are three Japanese OEMs, and that's Honda, Subaru and Toyota.

THE COURT: Okay. Response?

MS. TRAN: Good morning, Your Honor. May it please the Court, my name is Elizabeth Tran for the end payor plaintiffs. I will be responding to Mr. Love's argument on behalf of the end payors as well as the auto dealers.

As an initial matter, contrary to Green Tokai's representation, its motion to dismiss fails to raise any new arguments in auto parts. Its two main arguments, one, that plaintiffs haven't alleged enough specifics pursuant to Twombly, and two, that plaintiffs haven't sufficiently linked defendants' conduct to plaintiffs' injury, has been repeatedly rejected by this Court in this litigation.

Body sealings, as Mr. Love mentioned, is the 34th case in auto parts. It is no different than the 33 cases that precede it. Body sealings arises out of same DOJ criminal investigation into illegal price fixing and bid rigging in the auto part industry. Green Tokai, its

corporate parent and its corporate parent's executives were all indicted by a green jury -- grand jury for participating in the body sealings conspiracy. Green Tokai's co-conspirator, Nishikawa, paid $130 million in criminal fines and pled guilty. Three of its executives were also indicted.

This Court has heard this fact pattern ad infinitum over the last five years and has rejected motions to dismiss in light of allegations regarding market conditions, guilty pleas, investigations. Green Tokai just simply has not offered anything unique for the Court to reach a different outcome here.

The Court shouldn't deviate from its prior motion to dismiss orders for a couple of reasons. Plaintiffs have plausibly alleged that they indirectly purchased body sealings from defendants. Each of the complaints at issue are over 100 --

THE COURT: From these specific defendants?

MS. TRAN: Excuse me?

THE COURT: From these specific defendants, these three defendants that they're -- not defendants -- manufacturers? Excuse me. They purchased the body -- the body parts -- the body parts, oh my God.

MS. TRAN: Body sealings.

THE COURT: Yeah, from these defendants, and it is

the claim, I mean plaintiff is -- defendant is claiming, but you don't say you purchased -- your plaintiffs purchased any of the vehicles with these parts, right? I mean isn't that part of your --

MS. TRAN: That's correct, though plaintiffs aren't required to identify specific defendants that supplied body sealings in their vehicles, if I understand the Court's point. Defendants are jointly and severally liable for the conduct of their co-conspirators. So plaintiffs' injury is not limited to just the vehicles they purchased, at least containing body sealings supplied by Nishikawa or Green Tokai.

The complaints allege that the conspiracy goes beyond the two defendant groups in the case. The complaints allege that there are as yet unnamed co-conspirators and also an ACPERA applicant. Discovery will probably reveal additional defendants from which plaintiffs indirectly purchased body sealings.

THE COURT: Okay. What -- what's the primary thing that you believe, that you believe defendant is saying distinguishes this case from the 30-some parts that went before it?

MS. TRAN: I think Mr. Love's point is that plaintiffs here have only alleged that affected OEMs include Toyota, Honda and Subaru. That's not, in fact, what we

allege. We said that those three OEMs affected -- were affected by the conspiracies, but we didn't limit it to those three. Those three OEMs were identified in the Nishikawa Rubber plea agreement, but plaintiffs have alleged that all OEMs could be potentially affected, and this is supported by our allegation that we are seeking to represent all persons and entities who purchased or leased vehicles containing body sealings manufactured or sold by defendants, their subsidiaries or co-conspirators during the period.

The ADP complaint I believe also alleges that GM, Toyota and Ford purchased body sealings from defendants but again didn't limit it to just these three OEMs; they were just examples.

At this point in the case though there hasn't been discovery. This case is still subject to a stay. The information we have is based on our own investigation as well as the DOJ criminal investigation.

THE COURT: But could be -- you said could be potentially affected. That's really not the standard; it is the plausibility.

MS. TRAN: I apologize. We did, in fact, allege that all OEMs were affected by the conspiracy, and we do believe that discovery, once it is permitted, would show that all OEMs were affected.

And I -- I think given the -- the -- the broad and

large scope of the DOJ investigation, the fact that this body sealings conspiracy started in January 2000, the fact that it involves American companies as well as Japanese companies, that it could -- the conspiracy could very well, you know, affect every OEM out there.

THE COURT: All right. Thank you.

MS. TRAN: Thank you.

THE COURT: Reply, briefly?

MR. LOVE: Very briefly. Just a couple brief points, Your Honor.

There was a question and answer where plaintiffs claim that they aren't required to identify the specific products that they -- they purchased that were impacted by the conspiracy. Again, I note that there is no authority in -- in plaintiffs' opposition for this claim, and that we rely on both the Apple iPhone Antitrust Litigation, which holds the plaintiffs can't rely on an assumption of impact from a purchase of a related product where they haven't specifically alleged that they purchased a product that was impacted by the conspiracy, and the Magnesium Oxide Antitrust Litigation -- again, these are both in our -- our briefing -- which says you cannot assume that every product in a diverse market was impacted when conspiracy allegations related to specific products.

THE COURT: What percentage of the market does your

client have on this part?

MR. LOVE: I -- I -- I have no idea, Your Honor. I know there are a number of manufacturers of these rubber sealing products, and that's certainly an ongoing investigation with respect to the criminal matter that is indicated is proceeding where we also represent Green Tokai.

The -- the -- the other point I wanted to make just briefly, plaintiffs stated again that they didn't limit it to just three OEMs, and I -- I previously mentioned paragraph 89 of the EPP's complaint, which is the only paragraph they cite in their opposition to -- to support this claim, and it says for vehicles, the OEMs, mostly large automotive manufacturers such as Honda, Toyota, Subaru, et cetera, purchased body sealings directly from defendants, period. That is all it says. It mentions no other OEMs. It doesn't say they are alleging that there were sales or impacted OEMs other than these three. It -- it is just a general description that these are three of the OEMs that purchased body sealings directly from the defendants. There's -- there's no allegation of impact beyond these three Japanese OEMs.

THE COURT: Okay. Thank you very much.

All right. Let's hear from Nishikawa.

MR. TANSKI: Thank you, Your Honor, and good afternoon. My name is John Tanski from Axinn. I represent the Nishikawa defendants.

May I proceed, Your Honor?

THE COURT: You may.

MR. TANSKI: So, Your Honor, you just heard from Mr. Love, and he had a sort of broad motion attacking some of the antitrust theories that, you know, apply across a number of different states. We have the opposite, we have a very narrow motion. We are attacking two unjust enrichment claims that are pled under the laws of two specific states, Illinois and South Carolina. And our argument in a nutshell is this: In both of those states there is a specific legislative prohibition on indirect purchasers bringing antitrust claims as a class action.

THE COURT: So unjust enrichment is, as you say, an end run around this?

MR. TANSKI: That's our argument, Your Honor. And the counter-argument from the plaintiffs that you are going to hear is very similar to the one you just heard, which is you have decided this issue before.

And so what I would like to do, first off, Your Honor, if I may, is to just go through the many decisions that you've made and I think show you what issues have come before you with respect to unjust enrichment claims and then explain why you haven't seen the specific state authorities that we are citing, and those state authorities should cause you to give a different outcome here than has been the

outcome in some of the other cases.

THE COURT: All right.

MR. TANSKI: So the first case that the plaintiffs have cited is a 2013 opinion that you rendered in the wire harness case. Now, in that case the plaintiffs hadn't specified the states under which they were proceeding with their unjust enrichment claims, and so the defendants just said, you know, you can't -- you can't do that, you need to specify states, and you agreed with that. Your ruling was I'm dismissing unjust enrichment, there is no general federal common law of unjust enrichment so the plaintiffs need to plead specific states. Necessarily there was no discussion there of South Carolina law or Illinois law or any other state law.

The next set of opinions they cite are from 2014, and those were in fuel senders, heater control panels, instrument panel clusters, bearings and occupant safety systems. At this point the plaintiffs had specified all the states under which they were proceeding, and the defendants moved to dismiss basically for pleading deficiencies, saying, you know, you hadn't adequately alleged harm and things like that. And Your Honor very conveniently in those opinions put a summary paragraph at the beginning that said these are the things that the defendants are raising that I'm going to decide, and we have quoted those in our reply brief and cited

them for you so I won't quote them here. But suffice it to say there wasn't an allegation or an argument in any of those cases that there is a specific statutory bar and therefore you can't proceed with these specific claims.

So they then cite a 2014 opinion from a consolidated motion brought by AVRP and a number of other defendants. Now, in that instance there actually was -- there were a bunch of state law-specific arguments, it was a long brief, and at the end there were three pages where the defendants said for all the reasons we have given you, you should dismiss the antitrust and consumer protection claims in all of these states, and then you should get rid of the unjust enrichment claims too because unjust enrichment claims can't stand alone.

And you rejected that argument and you relied on a case from this district called In Re: Cardizem. And In Re: Cardizem states what we would call the general rule, and the general rule is just because a statutory claim fails, that doesn't necessarily mean that the unjust enrichment claim must also fail. I think the word they used in Cardizem was often, courts often award common law or equitable remedies even when another claim is not successful. And you said the defendants haven't shown me any reason to depart from that holding.

Now, what they had cited to you because they were

attacking a number of different state law claims was not any specific state authority; they had cited out of circuit MDL opinions. And you said I'm not persuaded, I'm going to follow what I think Cardizem says as the general rule.

So the last case I want to talk to you about from your prior holdings is actually not one the plaintiffs have cited but it is one we cited in our briefs, and I think it is the closest that any defendant has come to the argument we are making today. And that was a decision you rendered, I think it was December 30th, 2015, in one of the direct purchaser plaintiff cases on a motion by the wire harness defendants. They didn't address Illinois law but they did address South Carolina law, and they said -- they pointed out that South Carolina bars class actions for consumer protection and antitrust claims. And they said, well, you know, it would be an end run around that public policy for you to allow the unjust enrichment claims to proceed, and in support of that, they cited three MDL opinions from out of this circuit that had not previously been cited. And your opinion disagreed. You said I recognize there are three new opinions you've cited, but none of them persuades me to disregard Cardizem and the holding that I have made that, you know, generally these things are allowed to proceed.

So our submission here, Your Honor, is these prior cases had many, many issues and necessarily couldn't focus

very much on specific states and specifically South Carolina and Illinois. And what we have tried to do is to give you specific state law authority that you can follow rather than the general rule in Cardizem in making your eerie guess about what the Supreme Courts in Illinois and South Carolina would hold about whether an unjust enrichment claim is permitted.

So what are those state court precedents that we are citing? It's three cases. The first one is called Laughlin; that's from the Illinois Supreme Court. And in Laughlin, there was an argument, it was brought by hospitals alleging price discrimination. And in that case the Illinois Supreme Court looked and said, you know, the Illinois Antitrust Act doesn't allow for a price discrimination claim. The Illinois legislation considered that and rejected it, and therefore we are not going to allow the Illinois Antitrust Act claim to proceed.

And then they went on and looked at a consumer protection claim and said we are not going to allow this to proceed either. The word they used was incongruous. It would be incongruous to hold that the legislature acted to prohibit plaintiffs from bringing a certain kind of claim but would allow them to bring essentially the same claim based on the same facts with another label, and so they dismissed --

THE COURT: And not pled in the alternative, these are not alternative claims?

MR. TANSKI: Well, I think -- so you are going I think, Your Honor, to Skelaxin and its interpretation of Cardizem, that Cardizem was really looking at alternatives, and I think Laughlin approaches the issue differently. And we cited a case from the Northern District of Illinois called Siegel which I think really explains the distinction well. The -- the principle in Cardizem, in Skelaxin, in Siegel is if you have an antitrust claim that is theoretically available, you can also plead an alternative, whether it is unjust enrichment or consumer protection, and you might go through and at the end it might fail for some reason, insufficient proof or something like that, and it wouldn't contradict public policy for the plaintiff, if he or she or they can prove their claims, to then recover an unjust enrichment.

And I think Laughlin is looking at something different and Laughlin is saying when you have a specific statutory bar, then we are not going to allow you to plead in the alternative because the legislature has made a decision and has expressed the public policy of the state to say we don't want those types of claims to be litigated under our law, and, to use Laughlin's word, it would be incongruous, when the legislature has specifically said no antitrust claim, to say, well, we'll just do the very same thing and call it unjust enrichment. So that -- that's the principle

that we derive from Laughlin.

And there is a case we have cited from South Carolina called Hambrick that was very much the same situation. In Hambrick there was an allegation that a mortgage company had engaged in the unauthorized practice of law because they had charged as part of closing costs legal fees but they hadn't used a lawyer.

Now, the South Carolina legislature had specifically delegated to the South Carolina Supreme Court the regulation of the practice of law, and South Carolina Supreme Court said there is no private right of action for that, it's -- that's not our public policy, that's not how we want to regulate the practice of law.

So the Hambrick case went up to the South Carolina appellate court. The appellate court said you can't have a claim for unauthorized practice, and these other derivative claims, including unjust enrichment, have to fail also because otherwise it would controvert the public policy that the Supreme Court had expressed.

So we -- we think, again, you know, that stands for the legal proposition that we are urging here, which is South Carolina and Illinois have said no to indirect purchaser class action claims like the ones that are brought here, and therefore the unjust enrichment claim must also fail.

We've cited one more state law case which is called

Dema from the South Carolina Supreme Court. Now, that was an opportunity that the Supreme Court had to reject Hambrick, and one of the parties went up and said you shouldn't follow Hambrick, you should follow an Eighth Circuit case that we think, you know, decided the issue differently. And the South Carolina Supreme Court didn't do that. It discussed Hambrick and then it said even if Hambrick weren't controlling, the plaintiff's claim fails for another reason because they didn't adequately allege harm.

And I think the plaintiffs put a lot of emphasis on that and they say, well, the South Carolina Supreme Court didn't approve Hambrick. And I don't think we need to disagree with that to point out that they had a chance to reject it and they didn't. And so the best indication of how a South Carolina court would rule on this case comes from Hambrick, and Your Honor should follow Hambrick in South Carolina, Laughlin in Illinois, and hold that these claims are barred.

And I think, Your Honor, that I've -- I've covered the other point I wanted to make in response to your question about alternative pleading.

THE COURT: Right.

MR. TANSKI: And what I would do is just draw a line and say, you know, on one side of the line you've got Cardizem, you've got Skelaxin, you've got Siegel, cases where

the antitrust claim could exist, and therefore alternative pleading was appropriate. On the other side of the line you've got Laughlin, you've got Hambrick and you've got this case where the statutory claims can't exist and therefore the unjust enrichment claims can't exist either.

THE COURT: Okay.

MR. TANSKI: Thank you, Your Honor.

THE COURT: Thank you. Very good.

MS. LI: Good morning, Your Honor. My name is Evelyn Li. I'm with the Cuneo, Gilbert & LaDuka law firm.

THE COURT: Could you speak up please?

MS. LI: My name is Evelyn Li. I represent automobile dealer plaintiffs. I'm with the law firm Cuneo, Gilbert & LaDuka.

First of all, I would like to address the argument that Nishikawa defendants just made. This is important argument because they claim that being the defendants in this 34th case in this MDL, they have found new authorities on an old argument. This is truly an old argument; it is not new as Nishikawa counsel just claimed. For example, defendants in anti-vibration rubber parts, radiators, switches, motor generators, HID ballasts, electronic power steering assemblies, fan motors, power window motors, windshield washer systems, windshield wiper systems, inverters, fuel injection systems, valve timing control devices, constant --

constant velocity joint boots have all argued that, I quote here, the Court also should dismiss AD's unjust enrichment claims under the laws of any states for which the court dismisses AD's statutory antitrust and consumer protection claims. This parallel outcome is required because ADs cannot use parasitic unjust enrichment claims to recover on failed statutory antitrust and consumer protection claims. This is exactly the argument the Nishikawa defendants are bringing up here.

This old argument has been rejected again and again by Your Honor in your opinions. For example, in response to that argument I just mentioned and all of these cases I just mentioned, Your Honor ruled that, I quote here, defendants challenge IPP's unjust enrichment claims on various grounds but argue three new cases require dismissal of ADP's unjust enrichment claims in those states where the antitrust and consumer protection claims have been dismissed. None of the authorities cited overrule In Re: Cardizem CD antitrust litigation which the Court relied upon in its previous decisions in the 12-2311 litigation. Accordingly, the Court denies defendants' request.

In fact, the Nishikawa defendants agree that this issue that they bring up in this motion has been briefed and argued many times, has been decided by this Court consistently in our favor. It is clear that the question of

whether indirect-purchaser plaintiffs can make unjust enrichment claims under the state laws of those states where plaintiffs do not have statutory claims has been answered by this Court many times, and the answer is yes.

THE COURT: But we do have here specific cases in both Illinois and South Carolina that discuss their -- their laws that bar these actions.

MS. LI: Yes, Your Honor. I think that's a -- that's a very good question and I am going to respond to their citations to those so-called new authorities but I want to make sure that Your Honor -- Your Honor understands that their argument is an old argument. And I'll -- I'll go into those cases they cite in detail, but I want to first talk about what the plaintiffs believe to be the controlling authorities here.

We disagree that any of the cases they cited from state courts from Illinois or South Carolina are the controlling authorities here. We still believe and we respectfully submit that this Court should follow what it has done in the past and find that In Re: Cardizem and Skelaxin are the controlling authorities. In Cardizem the court clearly pointed out that courts often award equitable remedies under common law claims for unjust enrichment claims in circumstances where claims based upon contracts or other --

THE COURT: Could you slow down a little bit please?

MS. LI: Sorry.

The Cardizem court pointed out that courts often award equitable remedies under common law claims for unjust enrichment in circumstances where claims based upon contracts or other state law violations prove unsuccessful.

This means that in our situation here where our antitrust and consumer protection statutory claims were proved unsuccessful, we can proceed with our common law claim and unjust enrichment.

In Skelaxin the court's ruling made it even more clear that the argument that the Nishikawa defendants are making here should be rejected. Just like the defendants in Skelaxin -- the defendants in Skelaxin argue the -- the same as the Nishikawa defendants argue here. They say plaintiffs are precluded from asserting unjust enrichment claims because the claims are merely a means of circumventing state antitrust and consumer protection laws, and the Skelaxin court considered that argument and rejected it because it followed Cardizem.

Again, this is clearly -- this is clear enough, but I just want to emphasize that we are seeking recovery under the common laws of states that allow indirect purchasers to recover. Neither South Carolina nor Illinois prohibit

indirect purchaser actions, so allowing our unjust enrichment claim to proceed under those states' laws does not conflict with any prohibition on indirect purchaser actions.

The elements of unjust enrichment are different than the elements of those statutory claims, and both us and the defendants have analyzed and evaluated these elements of unjust enrichment claims in each state in our past briefs and this Court has decided in our favor many times in the past. So it is incorrect for the Nishikawa defendants to say that we are simply changing the label on our unjust enrichment claims. Our clients are injured here because they overpaid for their vehicles.

The Nishikawa defendants also tried very hard to distinguish their argument from the argument that was made by the defendants in Cardizem. However, they failed to do so. I will give you an example. The -- in the -- in Cardizem the defendants argue that plaintiffs' unjust enrichment claims are dependent upon the allegations supporting their state law antitrust claims and thus suffer from the same flaws that preclude plaintiffs from stating an antitrust claim, and -- and that argument is rejected by the Cardizem court.

Here the Nishikawa defendants state in their motion at page 4 the unjust enrichment claims expressly depend on the unlawful conduct pled in support of the antitrust and consumer protection claims. This is -- this is exactly the

same argument the Cardizem defendants made, and it should be rejected by this Court.

Now, let's -- let's move on to the authorities Your Honor was asking about. They say they found new authorities, but none of these -- none of these cases were decided even within the last year.

They also completely ignore the fact that many of their so-called new authorities have appeared in earlier briefings in this case. Some were even cited to by this Court in its opinions. I will give you an example. Let's talk about the case they just mentioned, the Dema case from the -- an opinion issued by the Supreme Court in South Carolina in 2009. In fuel senders, heater control panels, instrumental clusters -- instrument -- instrument panel clusters, this Court cited to Dema and found that Dema was a case that supports our unjust enrichment claims in South Carolina and not a case that helps defendants' argument.

For example, in fuel senders, Your Honor quoted from Dema: Under South Carolina law, a party may be unjustly enriched when it has and retains benefit or money which in justice and equity belong to another. And Your Honor ruled that at a pleading stage the Court finds the allegations satisfy the elements of South Carolina law for plaintiffs' unjust enrichment claims in South Carolina, so Dema is not a new authority.

It is worth noting here that the Dema case is one of Nishikawa defendants' most important new authority that they rely on in this motion. Because Your Honor has already considered this authority to be an authority that's helpful for our position, for our unjust enrichment claim, Your Honor should not change her mind now.

And another thing to bring up is that we think it is most likely the defendants in the first 33 cases have already looked at all of these so-called new authorities in the past, and they decided not to mention these authorities in support of the same argument that the Nishikawa defendants are making here, perhaps because they didn't think these authorities support that old argument.

I will give you two obvious examples. The Martis case and the Laughlin case that counsel just mentioned, they rely upon these two cases heavily in this motion. However, these cases were cited by defendants in the past cases in this litigation. For example, in heater control panels, instrument panel clusters, OSS bearings and fuel senders, defendants cited to Laughlin in support of their argument. The Martis case was also cited by defendants in OSS bearings and fuel senders.

So they are not new cases, they are not new authorities. So clearly it is incorrect for the Nishikawa defendants to say that Martis or Laughlin or Dema are new

authorities that no one else has looked at or considered before; they are not. And there is no basis to ask Your Honor to change her ruling on these old authorities when there is -- when there is no new authorities on old issue.

Besides, another problem with the authorities that the -- the Nishikawa defendants cited in their motion is that they either misquoted the statements made in their new authorities or cited to cases where the issue of unjust enrichment was not even before the court, or they have quoted speculative statement by courts where the courts simply discussed how they might rule, if they were to rule, on the issue of unjust enrichment. The Nishikawa defendants, in fact, do not have cases from the highest court in Illinois or South Carolina that say if plaintiffs do not have statutory claims, they cannot bring common law unjust enrichment -- unjust enrichment claims.

THE COURT: Okay.

MS. LI: So I think counsel mentioned -- for Illinois, counsel mentioned the Laughlin case. We can go into a little more detail in that case because I think Your Honor is interested to know more about what that court actually said. So in Laughlin, as I mentioned before, this is not even new authority. It is mentioned in the briefs, in -- in defendants' briefs in HCP, IPC, OSS bearings and --

THE COURT: Slow -- slow down.

MS. LI: Sorry. This case has been mentioned before in defendants' briefs in H -- HCP, IPC, OSS bearings and fuel senders.

This -- this case misses the point completely as in this whole -- in this whole opinion, it doesn't even mention unjust enrichment. Defendants argue that in this case the Court simply held that -- I'm sorry, defendants agree that in this case the Court held that a statute should be interpreted according to intent, that -- that's all. There is no -- there's no discussion on unjust enrichment as the word is not even mentioned.

But there -- there is no statute at issue in our case here as we are talking about unjust -- common law unjust enrichment claims. We, the IPPs, the indirect purchaser plaintiffs, are not seeking recovery under a statute provision for our unjust enrichment claims. We are seeking recovery under the common laws of Illinois and South Carolina.

That is why, when assessing whether the unjust enrichment claims may go forward, Your Honor looked to In Re: Cardizem which states that courts often award equitable remedies on their common law claims for unjust enrichment in circumstances where claims based upon contracts or other state law violations prove unsuccessful.

THE COURT: Okay. I'm going to have to have you

wind up now, okay?

MS. LI: Okay. So I'll just -- I will briefly address the other authorities that Your Honor were inquiring about. So the Hambrick case, I think it is another authority that defense counsel relied heavily upon. Give me a second here.

So plaintiffs in that case allege that defendants was unjustly enriched only because it violated the rules against unauthorized practice of law. In our situation, whether or not defendants' actions violated state law, plaintiffs would have overpaid for their vehicles as a result of defendants' conduct. Plaintiffs suffered because they overpaid, not because defendants broke the law. Plaintiffs' case is completely different from that in Hambrick.

Further, Hambrick does not hold that common law claims barred where plaintiffs chose not to bring statutory claims due to a class action bar, it does not hold that. It holds instead that plaintiffs cannot recover in unjust enrichment for an offense where the injury is based on the unauthorized practice of law because there is no private action, there is no private action based on that fact, based on the unauthorized practice of law.

Here in our case there -- there are numerous private rights of actions for overpayment for plaintiffs' -- for plaintiffs' vehicles. Plaintiffs are not barred from

bringing private cases for overpaying for their cars. South Carolina -- South Carolina law contains no such prohibition. The court in Hambrick simply stated that it cannot create a private cause of action for unauthorized practice of law, but in our case this is different because our client have monetary damages. The Supreme Court of South Carolina also declined to adopt the ruling in Hambrick as the governing law in South Carolina. So citing to Hambrick does not help their argument.

THE COURT: Okay. Thank you.

MS. LI: Thank you.

THE COURT: Brief reply.

MR. TANSKI: Thank you, Your Honor.

And before I begin, does the Court have any questions it would specifically like to --

THE COURT: Now, why should I change the rulings that I have made before?

MR. TANSKI: Well, I think, Your Honor, before you have been willing to look at issues again when arguments and authorities that you haven't previously considered have come before you. You actually have a very nice quote, saying the Court is not going to elevate law of the case over its duty to defer to state law. And so when we have read your prior opinions, we have seen you saying I recognize In Re: Cardizem as a general rule, and if you want to convince me to change

my mind, you need to show me specific state law authority that I should follow instead. And we submit respectfully that we have done that and that you should follow the Laughlin case and the Hambrick case.

And, you know, Counsel tried to make some factual distinctions in those cases. I wouldn't say that those are completely on all fours exactly the same facts here. I think they are similar cases, and I think more importantly that they state a legal principle and the legal principle is what you should follow, which is when the legislature expresses public policy by barring a certain claim, it doesn't really matter what label is attached to it, the legislature doesn't want that kind of claim to go forward.

And what they have done here is they have brought an indirect purchaser class action claim for, as -- as counsel kept saying, you know, my clients overpaid for their vehicles. Why did they overpay? Well, if you look at their complaint, they say they overpaid because there was an antitrust conspiracy. You can't bring those claims in Illinois or South Carolina, it is against public policy to do that as an indirect purchaser in a class action, and it shouldn't matter if you call it unjust enrichment.

THE COURT: Okay.

MR. TANSKI: Thank you, Your Honor.

THE COURT: Thank you very much. All right. I

think we will go for one more motion and then we are going to have to break for lunch. This is Meritor's motion?

MR. SAYLOR: Yes, Your Honor.

THE COURT: I want you to stick to a ten-minute timeline, okay?

MR. SAYLOR: I will do my best, Your Honor. Larry Saylor for -- representing Meritor from Miller Canfield.

The exhaust system cases are very different from any of the other auto parts cases that have come before this Court for one important reason: That none of the defendants in the exhaust system cases have pled guilty to any antitrust violation.

But even more importantly from my standpoint, Your Honor, is that Meritor is unlike any other defendant in any auto parts case for one very important reason: That Meritor sold, completely exited the exhaust --

THE COURT: It totally sold the exhaust systems in 2006?

MR. SAYLOR: 2007.

THE COURT: 2007.

MR. SAYLOR: That is correct, Your Honor.

THE COURT: And it filed its public reports to that effect?

MR. SAYLOR: That is correct, Your Honor. Filed 8-Ks with the SEC, so it was a publicly announced sale. The

plaintiffs acknowledge this, both sets of plaintiffs acknowledge this sale in their complaints. And there is no allegation anywhere in the complaints that Meritor retained any contact, any control over that business, any -- received any benefit from that business after the sale.

So the first point that I want to make, Your Honor, is that Meritor by that sale, by that publicly announced sale, withdrew as a matter of law from any antitrust conspiracy that is alleged in this case, and as a result, Meritor is not liable for any alleged acts of its co-conspirators after the date of that withdrawal, so those claims should be dismissed.

The law is clear, Your Honor, that a defendant withdraws from an alleged conspiracy when it engages in actions that are inconsistent with the conspiracy and makes a reasonable effort to announce that to its co-conspirators. It isn't necessary for the plaintiff to -- or -- or for the defendant to disclose the alleged scheme to the authorities or to -- or to potential plaintiffs. That's clear from the United States Gypsum case and many others. The Eleventh Circuit in Morton's Market and cases following it like Drug Mart and Precision Associates hold very clearly that the complete withdrawal from a business that is alleged to be part of a conspiracy constitutes withdrawal as a matter of law and terminates the liability of the withdrawing defendant

at that point.

The plaintiffs point out that withdrawal is an affirmative defense, and they are right about that, but the cases are also very clear, as we've pointed out in our briefs, that dismissal is proper where an affirmative defense is apparent on the face of the complaint, as it is here.

With nothing else, the plaintiffs turn to rank unpleaded speculation. They -- they argue that it is possible that Meritor retained some contact, some control over this business, received some benefit over -- or from this business after its sale. And they cite cases where the defendant incompletely sold a business; cases where payments to the defendants were contingent on the future revenues of the business case; a case where the defendant remained the major stockholder of the business; a case where the defendant retained inventory and continued to sell the inventory and continued to license technology to its alleged co-conspirators.

But none of those things are alleged here and none of them could be alleged here because that would be directly contrary to the Meritor's public SEC filings, which this Court can and should take account of in ruling on a motion to dismiss. Those filings make it clear that Meritor completely exited the business in 2007 for a liquidated price and retained only assets that are used in its other businesses.

Plaintiffs also argue that Meritor would be free to re-enter the exhaust system business because it had a non-compete that expired in 2012, but plaintiffs don't make any allegation that Meritor has made any plans or has any intention of re-entering that business even though the non-compete has long since expired. It would be just as illogical for the plaintiff to seek relief from a company that you or I formed yesterday that has never engaged in the exhaust system business because it might in the future. So plaintiffs' claims again Meritor based on conduct after it exited the exhaust system business should be dismissed.

The second point that I want to make is this: That plaintiffs' damage claims against Meritor based on conduct occurring before the sale of the exhaust system business are barred by the statutes of limitations. It is well settled that withdrawal -- that -- that a defendant's withdrawal from a conspiracy starts the statutes running as to that defendant as of the time of the withdrawal. And all of the statutes here in all the states are between two and six years. The statute under the Clayton Act is four years, as -- as are many of the state statutes. It has been almost nine years and over eight years.

THE COURT: But the argument of when the statute was started and --

MR. SAYLOR: Your Honor, we -- the -- there --

they have a -- they have really two arguments. One is an argument of fraudulent concealment, and then they have another argument that they call the -- the discovery rule. And I will show the Court that those two rules really are one in the same rule in this circuit and in the states. The Court -- this Court in -- let's see, this Court in wire harness and in fuel senders recognized that the states -- some of the states apply a discovery rule that is essentially the same as the federal fraudulent concealment rule that requires as a predicate either a fraud-based claim or an antitrust claim plus allegations of fraudulent concealment.

The Sixth Circuit has held very consistently in Akron Presform, Pinney Dock and Dayco and then most recently in the Carrier case, all of which we have cited, that because fraudulent concealment is an avoidance of the statute of limitations and because statutes of limitations are favored in the law, statutes of repose are favored, that the party seeking the benefit of fraudulent concealment has to -- has the burden of establishing it, and that under Rule 9(b), fraud, as the Court well knows, needs to be pled with particularity.

So it is clear from this Court's rulings in fuel senders, from the Sixth Circuit's rulings in Carrier and Pinney Dock and many other opinions, Judge Duggan's rulings in dry cleaning, Judge Cox in refrigerant compressors, that

fraudulent concealment requires affirmative conduct that is separate from and in addition to the underlying alleged antitrust conspiracy. It isn't enough to allege mere silence. It isn't enough to allege unwillingness to reveal wrongful conduct or -- or even secret meetings.

Carrier makes it clear as well that conclusory allegations of fraudulent concealment aren't enough, and all the plaintiffs have here are conclusory allegations, and I will quote their complaint. They say that defendants met and communicated in secret to conceal their conspiracy. It -- it -- really, that allegation could not be more conclusory or more devoid of facts. And nowhere in plaintiffs' complaint do they identify the place of any meeting, the -- the -- the substance of any meeting and so on. It's -- there's no -- they -- they don't allege, unlike in this Court's opinion in fuel senders, that the defendants engaged in any particular communications to monitor the conspiracy, that they used code words, code names, any of that, none of that is alleged here. So for that reason, the -- their reliance on wire simply doesn't -- doesn't get them there.

They -- their conclusory allegation that the alleged conspiracy is self-concealing also doesn't toll the statute in the Sixth Circuit. In Pinney Dock the Sixth Circuit expressly held that an antitrust conspiracy is not self-concealing and that the plaintiffs have to plead and

prove specific acts of concealment, and then Judge Duggan followed and applied the Pinney Dock ruling in -- in dry cleaning. In -- in scrap metal, a most -- a more recent Sixth Circuit case that has been mis-cited by the plaintiffs, the Sixth Circuit reiterated that antitrust conspiracies are not self-concealing.

So -- so plaintiffs have to allege fraudulent concealment, acts of fraudulent concealment, specific acts over and above the conspiracy, and here they simply haven't done that.

They also argue that fraudulent concealment against Meritor could be proven by reference to acts of other conspirators, other alleged co-conspirators. Of course, the plaintiffs here haven't alleged fraudulent concealment against any of the exhaust system defendants adequately.

But even if they had, the -- the Riddell case that plaintiffs themselves cite holds that only affirmative acts of concealment that are essential to the alleged conspiracy can be attributed to other alleged co-conspirators. And because concealment isn't -- fraud and concealment are not essential elements of the conspiracy that is alleged against Meritor, Riddell would not allow any acts of any other co-conspirators to be attributed to Meritor.

As -- as I've mentioned, the discovery rule, the plaintiffs argue that the discovery rule somehow now trumps

fraudulent concealment, allows the plaintiffs to jump directly past fraudulent concealment, don't have to allege that anymore, don't have to prove it anymore, they can go directly to the question of whether plaintiffs were diligent.

That flies in the face of all of the Sixth Circuit opinions, all of which have held that fraudulent concealment has to be pled with particularity. Plaintiffs now say it doesn't have to be pled at all. That's -- that's simply wrong, Your Honor, as a matter -- in the -- a matter of law, certainly in the Sixth Circuit. They cite one outlying Seventh Circuit opinion that -- that does not represent the -- as -- as the plaintiffs characterize it, does not represent the law in -- in this circuit.

The third -- third point -- and -- and so for those reasons, the -- the claims against Meritor based on conduct prior to the sale of the business are barred by the statute of limitations and should be dismissed.

The third point I want to make that is unique to Meritor is this: That plaintiffs' claims for injunctive relief against Meritor don't state a claim on which relief can be granted, and plaintiffs lack standing under Article III because they haven't pled and, indeed, really can't plead or prove a real immediate and cognizable danger of -- of -- of a recurrent violation by Meritor. Meritor is no longer in the business. They don't allege -- they would have to

allege, at a minimum, that Meritor had some intent to get back in the business. Secondly, that plaintiffs would directly or indirectly once again purchase exhaust systems manufactured by Meritor. And thirdly, that Meritor was likely to again engage in some alleged conspiracy to fix prices or rig bids in the exhaust system business. And -- and plaintiffs haven't pled any of those things and really can't plead any of those things based on the fact that Meritor has -- has fully exited from the business.

So the -- the -- the Sixth Circuit opinion in Rosen, the Supreme Court's opinion in Whitmore, the Sixth Circuit's opinions in Day -- in Dayco and the Tenth Circuit in B-S Steel all hold in the court that -- that injunctive relief is inappropriate and that the claims for injunctive relief should be dismissed in circumstances like these.

The fourth and final point, Your Honor, that I want to make is --

THE COURT: Make it quick. Your time is up.

MR. SAYLOR: I will rely on our brief and -- and arguments of our co-defendants, but that is that plaintiffs' -- plaintiffs' conspiracy allegations against Meritor are -- are inadequate under -- under Twombly and Iqbal.

THE COURT: Thank you.

MR. SAYLOR: Thank you, Your Honor.

THE COURT: Response?

MR. REISS: Good morning, Your Honor. Will Reiss for the end payor plaintiffs, and I'm also going to be speaking for the auto dealer plaintiffs.

And I know earlier there was another Reiss who spoke, and this case is confusing enough, so some of us on the plaintiffs' side refer to the other Reiss as the evil Reiss, and I encourage you to do the same. He's not here now to defend himself so I figured I would -- no, I have told him that as well.

But I just want to --

THE COURT: Let's -- let's start with the injunctive relief and get rid of that. If they are not in business, what are you -- what is your irreparable harm --

MR. REISS: Well, so the injunctive claim is depend --

THE COURT: -- to business in this area?

MR. REISS: -- is dependent upon their argument that they withdrew from the conspiracy, and that, in fact, is, for the reasons I would like to discuss, is a fact question.

So if they did not truly withdraw from the conspiracy, and case law is clear that just the mere sale of the business alone does not constitute withdrawal as a matter

of law absent a developed factual record, so if there is some suggestion -- and we --

THE COURT: They filed reports, they are done, they are out of this business. Who -- what are they going to conspire?

MR. REISS: But -- but, Your Honor, there is case law that -- that -- that -- that says that they have an obligation not to just to show that they actually sold the business but that they actually completely and totally severed all ties. So we cite the case --

THE COURT: How do they do that? How do they do that when they are not in business?

MR. REISS: So -- so, first of all, the -- the -- the burden is on -- on them. This is an affirmative defense. And yes, they cite case law for the proposition that when an affirmative defense is clear on its face, yes, the Court can rule as a matter of law. But there are a number of cases out there, and we -- we cite to the Lithium Ion Batteries case, there is also the CRT's case, where the Court has said, look, the -- the -- the mere sale of the business without more doesn't constitute withdrawal. You need to demonstrate as a defendant that, again, you severed all ties, that you didn't have an economic interest in the business.

So in the Lithium case, for instance, this was on summary judgment. And by the way, all the cases cited by --

by the defendant is -- is -- are summary judgment cases with one exception, and I will -- I will distinguish that one exception. But in the Lithium case, there was evidence that the -- the defendant still retains some sort of an interest in the business. I think it -- it retains some -- some inventory and was selling some excess inventory after the sale of the business. It retained its intellectual property right and it also retained some additional assets.

Now, if you look at Meritor's financial disclosures, A, it's a -- it's a statement saying that it sold the business, but, B, they attach an asset purchase agreement. In that asset purchase agreement there is a section that says assets that are excluded from the transaction. Okay. And -- and -- and there are a number of assets. There is intellectual property, just like in -- in the Lithium case where the Court said that wasn't sufficient on a motion to dismiss. There are other asset terms that are -- are undefined. They refer to a disclosure statement which is not attached to the financial statements. We looked for it to see if we could find it, whether it was publicly filed; it wasn't.

So there is -- there is a large question about what, in fact, was excluded from the sale, what was retained, what benefits did they derive from the conspiracy, did they continue to participate in -- in trade associations. That

was another finding that the Court held in Lithium, that -- that the -- the defendant was still involved in trade associations.

And, again, I -- I -- I can't emphasize enough, Your Honor, that the burden is on the defendant, it is an affirmative defense. So the -- you know, again, if it's on its face clear that they withdrew from the business, then that's one thing. But -- but the mere sale alone -- and there is not one case that -- that -- that Meritor cites to that stands for the proposition that just selling a business without more, as a matter of law, without a developed factual record constitutes withdrawal.

They cite to this Morton's Market opinion; that's an Eleventh Circuit decision. That was decided after years of discovery on a factual record where the Court concluded definitively based on the facts that there was no evidence that the defendant in that case failed to actually sever itself completely and totally from the business. And all the cases hold that, that, again, you have to sever yourself completely and totally from the business, with the burden on the defendant.

Now, maybe there will be as simple at some point as the defendant submitting a declaration that it did this, but we, at a minimum, should be entitled to some discovery to determine what were these assets that were excluded; you

know, what -- what, if any, interest did they have in -- in competing in other jurisdictions?

My colleague alluded -- alluded to there was a non-compete clause that was negotiated in the asset purchase agreement, but it explicitly provides that Meritor can reenter the business. It also excluded certain jurisdictions, so they can actually -- and I'm not sure whether they have, but they -- they can reenter the business and -- or continue to compete in the business in other jurisdictions.

So without answering these questions and without being permitted some modicum of discovery, you know, we just can't know what, if any, financial interest they have and what they are -- they are continuing to do.

THE COURT: They have a non-compete agreement?

MR. REISS: They had a non-compete agreement and it provided that from the date they entered into the agreement, I believe for three years they could not reenter the United States market; it may have been five years for the United States and three years for Europe. But that -- that deadline has long past so they are now free to reenter those markets. And as I mentioned, there were certain geographic regions that were excluded, so that they may be maintaining and competing in those regions and maybe they'll receive some consideration from that.

There are also permitted I think under the agreement to maintain an ownership of, I think, ten percent or less in some companies, so they may have joint ventures out there.

So they may, again, still be deriving some benefit from the conspiracy.

And -- and I just want to cite to the one case that they cite for the proposition that this can actually be decided on a motion to dismiss. It is this Precision Associates case in the Eastern District of New York, and that case is wholly inapposite to the facts here. That case didn't involve a sale of a business. So unlike here, the defendant actually turned itself in. It went to the authorities, it -- it ratted out the other defendants, and it was actually working affirmatively against the -- the -- the co-conspirators.

And nonetheless, the plaintiffs in that case pleaded that the defendant was still continuing to participate in the conspiracy notwithstanding the fact that it had turned itself in, and the Court said, well, that's not plausible, those allegations aren't plausible. And moreover, the Court found that the plaintiffs didn't have any allegations suggesting that the conspiracy continued after the defendant turned itself in. But that's a very different question than whether just selling a portion of your business

where you are -- you are retaining some assets actually constitutes a withdrawal.

And again I would refer the Court to the Lithium case, to the CRT case which denied a nearly identical motion to dismiss. And again the judge said how am I supposed to determine this on a motion to dismiss without the benefit of discovery when all of these questions are unanswered, because, again, the defendant has the burden of demonstrating that it severed all ties from -- from the conspiracy.

THE COURT: Okay. Thank you.

MR. REISS: Just turning briefly to -- to some of the other issues, fraudulent concealment. So even if -- if Meritor's defense is -- is somehow successful, that they, in fact, did withdraw from the conspiracy in 2007, and, again, I would submit that's a fact question, as Meritor concedes, we plead fraudulent concealment; we also plead the discovery rule.

And it is notable that under the discovery rule, Meritor doesn't even challenge those allegations or at least they didn't in their principal motion to dismiss. And so we cite authority that where you don't raise this issue in your principle brief, it is waived. They do raise it for the first time in their reply brief. We didn't have an opportunity to respond to that because it was first raised in their reply brief, but -- but I will just briefly address it.

I mean this Court has found that the discovery rule is applicable in a number of the -- the relevant state statutes that we plead, and it's -- it's -- it's very telling that Meritor doesn't cite to a single one of the state antitrust and consumer protection statutes that we cite where the discovery rule applies, they don't try to distinguish that.

Instead, what they say is that the Court somehow conflated a -- a fraudulent concealment standard along with the discovery rule, and that -- that just defies logic. A, it is contrary to the language of the state statutes, which again Meritor doesn't even try to distinguish, and, B, it would render the discovery rule superfluous because if a discovery rule imposed a fraudulent concealment standard, it would be no different than fraudulent conceal -- concealment, which clearly it is not.

And then the -- the last group of cases that -- that Meritor tries to distinguish is they make this rather odd argument that the discovery rule is -- is inapplicable to federal damages claims, but we don't assert any federal damages claims. And your Court has held in -- in prior opinions, in the wire harness opinion that -- that clearly the discovery rule under state laws is different than federal law.

But even if federal antitrust damage laws somehow

governed, and it doesn't in this case, we cite to the -- the Copper opinion, which is a Seventh Circuit opinion, which found that the discovery rule does, in fact, govern federal antitrust claims. So any way you slice it, our discovery rule allegations are sufficient.

And then just briefly with respect to -- to fraudulent concealment, it is -- it is the same old allegations -- same old arguments that you have heard, you know, multiple times. I mean you have a defendant who is challenging whether, in fact, we show that there was an affirmative act of concealment. And we allege, Your Honor, and we actually cite on -- on page 12 of our brief, to four different opinions in which you have ruled on this identical issue. You found that -- that allegations of code names, which we allege, of monitoring the conspiracy, which we allege, and of -- of representations that the bids were competitive and weren't secret, that those were all sufficient to adequately allege fraudulent concealment.

And -- and all of these cases that defendants are citing, these are cases that have already been brought before Your Honor, the Pinney Dock case, the Carrier case, which basically said that plaintiffs need only allege some trick or contrivance. And you even found that is a very low burden, it's a very small standard, particularly on a motion to dismiss where we don't have the benefit of discovery, we

don't have the benefit of all that.

And so to -- to answer your initial question about injunctive relief, unless we have a determinative conclusion that they exited the conspiracy in 2007, which we don't, which is -- should not be addressed, at least without the benefit of limited discovery, we can't determine whether our injunctive relief claim fails.

And I -- I just -- I know you have a long day, so I do want to briefly address one last issue, and you are going hear this from a lot of the exhaust system defendants, that this case is somehow very different than -- than all the other cases because there is no guilty pleas.

Well, we allege a lot of specifics here. I mean we have got an amnesty applicant, Tenneco, who admitted that it had received conditional leniency from the government. In order to do that, Tenneco had to admit to wrongdoing, had to admit that there was an active conspiracy involving exhaust systems, which is the product at issue. And -- and by definition, a conspiracy involves one -- more than one defendant, right?

So we allege market conditions sufficient to a conspiracy. This is again something the Court has -- has noted bolsters our plausibility. We allege illustrative examples including examples related to Meritor involving its conspiratorial conduct. You know, we -- we go above and

beyond.

And -- and, you know, these illustrative examples, Your Honor, are not typical in antitrust cases, and we talk about this in our brief. You know, the average antitrust case, because defendants are very sophisticated, you don't have smoking guns, you don't have evidence of agreements or communications, but here we do have this. And I'm not going to ask you to clear the courtroom so we can get into our illustrative examples, but suffice it to say that we allege the identity in many instances of the employees involved, the communications that took place and the locations that took place, and that's -- that's more than sufficient to satisfy that burden.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

Reply?

MR. SAYLOR: Thank you, Your Honor. Very, very briefly.

Plaintiffs allege in their complaint that Meritor sold its exhaust system business. There is no allegation anywhere in the complaints that Meritor's sale of the business was anything less than complete. And the 8-K that SEC filed or that -- that Meritor filed with the SEC makes it very clear, and we cite in our briefs the relevant sections of that disclosure, that Meritor retained only assets that

are used in its only -- in its other business, only intellectual property and assets that are used elsewhere in its businesses.

There is nothing in that statement and nothing in the complaint that would indicate that Meritor did anything less than completely exit this business in 2007. Anything more than that is pure unpleaded speculation, and it is unfair to keep Meritor in this case under those circumstances.

The Precision Associates case that we cited and that --

THE COURT: So let me just get this straight. So in order to prove that you had withdrawn by this sale, you filed these SEC papers, and plaintiff is saying you have the burden to show that you have totally withdrawn. But does it flip, would they have the burden to show that, what, you lied on these SEC papers?

MR. SAYLOR: Well, Your Honor, the -- the -- the 8-K form is, and we have cited a number of cases that hold, relevant and -- and admissible. And -- and even though this is a motion to dismiss, that being a public government document can be considered and should be considered by the Court in ruling on this -- on this motion.

Secondly, if you -- if you -- if Your Honor reviews the relevant sections of that document, which we cite in our

brief, it shows without any ambiguity that Meritor sold this business lock, stock and barrel and has no continuing involvement in that business.

THE COURT: Right. But that's why I'm asking, does it then flip the burden back to -- not back to but to plaintiff to show that this was some fraudulent document?

MR. SAYLOR: Your Honor, what -- what the cases hold is that a public document like the 8-K form is considered to be part of the pleadings. So here we have a -- we have withdrawal, which is evident from the face of the pleadings between plaintiffs' allegation, unqualified allegation that Meritor sold the business and the -- and the disclosures in the 8-K that there weren't any strings attached to that sale.

THE COURT: But they have had no -- no discovery?

MR. SAYLOR: That -- that is correct, Your Honor. But -- but if we -- if we take all of that together as the plaintiffs' pleading, there is nothing -- there no reason for discovery. Meritor exited the business in 2007 and the claims go away.

THE COURT: Okay.

MR. SAYLOR: With respect to the discovery rule, the -- the Copper case that -- that counsel referenced stands alone. That's the only antitrust case we have seen anywhere in the country that -- that uses sort of an unqualified

discovery rule that says that fraudulent concealment no longer matters.

This -- this Court's own opinions in wire harness and fuel senders make it clear that the discovery rule as applied in the states and -- and -- and of course in this circuit through Pinney Dock is essentially the same as fraudulent concealment, there is very little difference; they both depend on fraud. And Pinney Dock made it clear that where -- that antitrust claims don't -- are not fraud based, they are not fraud claims. So therefore fraud, if it is going to be alleged, has -- the plaintiffs have the burden on that and they have to plead and prove fraud with particularity.

THE COURT: Okay.

MR. SAYLOR: Thank you, Your Honor.

THE COURT: Thank you very much. All right.

MR. REISS: Your Honor, with -- with the Court's indulgence, may I make just one -- one quick point?

I just -- just want to be clear about this. I think I alluded this -- to this earlier, but I want to make it clear that the -- the asset purchase agreement that Counsel alluded to does not on its face demonstrate that -- that Meritor sold all of its business. It explicitly excludes assets from the sale. And, again, without the benefit of additional documents, it is difficult to determine

what those assets were, but specifically intellectual property was -- was -- was excluded. Specifically some other assets that are undefined, and as I mentioned before, refer to disclosure statements that we don't have the benefit of, and I -- I -- counsel is -- is not denying that. In fact, in their -- in their motion to dismiss, they even concede that they sold substantially all of the business.

So even on the face of the documents, we are not -- we are not asking the Court to just suppose or allow us to go on some sort of a fishing expedition. There is a clear suggestion from the asset purchase agreement that's attached to their financial filings that they didn't sell all of the assets associated with the business.

THE COURT: Okay.

MR. REISS: Thank you.

MR. SAYLOR: Your Honor, if I can have 30 -- 30 seconds.

The -- we've cited in our reply brief the sections -- in a -- in a footnote the sections of the 8-K that show that -- and -- and the sections of the asset purchase agreement that show that the assets that were retained are only assets used by Meritor in its other businesses.

THE COURT: Okay.

MR. SAYLOR: Thank you, Your Honor.

THE COURT: Thank you very much.

All right. We will take a half an hour break.

THE LAW CLERK: All rise. Court is in recess.

(Court recessed at 1:28 p.m.)

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(Court reconvened at 2:07 p.m.; Court, Counsel and all parties present.)

THE LAW CLERK: All rise. Court is back in session.

THE COURT: You may be seated.

All right. This is the motion for final approval of the proposed settlement with GS Electeck by the DPPs.

MR. KANNER: It is, Your Honor. It is my motion with GE -- excuse me. Steve Kanner on behalf of direct purchaser plaintiffs. Excuse me.

And it is a combined motion for GS Electeck and Tokai Rika.

THE COURT: Okay.

MR. KANNER: And if -- with the Court's permission, I will speak for a few minutes and then I will be happy to answer any questions the Court may have.

THE COURT: Is there anybody here objecting to this motion? I know you have received no written objection.

MR. KANNER: That's correct.

THE COURT: Anybody in the courtroom objecting?

(No response.)

THE COURT: All right. Mr. Kanner, you may proceed.

MR. KANNER: With that, I will proceed with a little bit of litigation history and then describe the actual settlements.

Wire harness cases began, as Your Honor knows, in 2011 at the end of the year. Your Honor appointed the four co-lead firms -- firms for the plaintiffs' group as co-lead counsel and named Mr. Fink as liaison counsel in March of 2012. You consolidated the matter in the spring of that year, and the first consolidated complaint for our group was filed in May of 2012, and that was filed -- followed, of course, by several amended consolidated complaints.

The defendants filed multiple motions to dismiss beginning in July of 2012. The motions were all subsequently denied in June of 2013.

The direct purchaser plaintiffs filed our second consolidated complaint, amended complaint adding GS Electeck in August of 2014. GS Electeck answered the complaint denying allegations in December of 2014. We also included Tokai Rika in that version, and with similar responses.

The settlement with GS Electeck was reached on April 26th of 2016, and with Tokai Rika on July 5th, also of 2016.

As the Court knows, we had reached some interim settlements prior to that with Lear in the amount of 4.75 million for which the Court granted final approval in 2014.

The direct-purchaser plaintiffs also reached settlements with the Fujikura defendants in November of 2016 in the amount of $9.5 million. I believe you have approved preliminarily that settlement and we'll be moving for final approval in conjunction with the other cases.

And of course Your Honor is aware of the recent settlements with Yazaki for $212 million, Sumitomo for $25 million, and Chiyoda for 1.15 million.

With respect to the settlements at hand, the settlements that are before the Court today were obtained through the diligence and hard work of counsel on both sides of the V. The negotiations were indeed at arm's length by experienced counsel who made decisions recognizing the inherent uncertainties of law and facts along with the related risks of this highly complex litigation. Plaintiffs' counsel determined that the dollar value coupled with the defendants' cooperation provided ample justification as the consideration for these settlements.

With respect to the proposed notice of settlement, it is a joint notice, as Your Honor is aware. Following preliminary approval, 3,874 individual copies of the combined

notice of proposed settlement were mailed to all potential class members, and that's the number after de-duping.

In addition, summary notice of the proposed settlement with today's hearing date was published in one edition of the Automotive News and in the national edition of the Wall Street Journal on November 21st of 2016.

Additionally, copies of notice were and are currently posted online at the autopartsantitrust litigation.com; that's our website for these cases. The declaration of our product manager with Epic Class Action and Claims Solution, Guy Thompson, which is attached, of course, to our -- to counsel's report on dissemination of notice, reflects that as of January 10th, 2017 there were 2,985 unique visits to the settlement website and 797 unique visits to the wire harness section.

Finally, both -- counsel for both GS Electeck and Tokai Rika have advised us they have fulfilled their obligations under KAFA, disseminating notice of the requisite notices to the appropriate federal and state officials on September 23rd, 2016 for GSE, and September 27th, 2016 for Tokai Rika.

There are two primary components to the consideration for settlement. First are the amounts. The settlement with GS Electeck is $3.1 million, the Tokai Rika settlement is for $800,000. The amounts are not reduced by

the one opt-out, just to the Tokai Rika settlement. And accordingly, the total for these admittedly smaller defendants with a correspondingly small affected volume of commerce is $3.9 million.

The second material benefit to the class is the cooperation element for both defendants. The nature and extent of the cooperation is set forth more fully in our papers. Additional cooperation from the defendants has and will continue to provide information in pursuing the remaining non-defendants, and that -- that group of remaining non-defendants is shrinking steadily.

A word about the size, Your Honor. Some of the wire harness defendants in this case, as you know, are very significant-sized companies. They are international entities with sales in the billions of dollars. Some of the defendants are much smaller with affected volumes of commerce in single or barely double digits. The defendants in this particular settlement are in the -- in that latter category with respect to wire harness sales.

With requests -- with respect to requests for exclusion, as the Court knows, the largest members of the class are extraordinarily sophisticated OEMs with equally sophisticated counsel.

Here the class members include OEMs in a large number of companies in the supply chain. Of those class

members, only one domestic OEM, Ford, chose to opt out, only from the Tokai Rika settlement. It is not entirely surprising since Ford is actually -- has obviously carried on its own action against the various defendants. Accordingly, again, the total amount -- gesundheit -- the total of the settlements is $3.9 million for the two.

And finally, of course, there have been no objections. No one appeared today on behalf of any objectors and none have -- no objection been received by counsel.

So today, Your Honor, we are asking you to enter three orders. The first relates to the stipulated form of final judgment with respect to the GS Electeck entities. The second is also a stipulated form of final judgment with respect to the Tokai Rika entities. And the third is an order granting direct purchasers' request for authorization to use some of the funds from the combined settlement for purposes of current and future litigation expenses, although as I understand, it is no longer future litigation expense, that these are expenses that have been incurred thus far.

Concluding, Your Honor, the direct purchaser counsel believe that the two settlements before Your Honor today meet the requirements of Rule 23(a) in terms of commonality, numerosity, typicality and adequacy, and that they are appropriate for certification as settlement classes in that common legal and factual questions predominate and

that a class action is, in fact, superior to any other method of adjudication.

I'd be pleased to answer any questions the Court has.

THE COURT: I have no questions.

MR. KANNER: Thank you, Your Honor.

THE COURT: Thank you.

Does the defendant have anything?

UNIDENTIFIED ATTORNEY: No, Your Honor.

THE COURT: Okay. All right. The Court has --

MR. KANNER: Your Honor, do you have copies of all the proposed orders? I have extra copies.

THE COURT: I do not here, but I think what they should do is go through Kay so that they can be signed and then disseminated or filed in the appropriate --

MR. KANNER: We'll make sure that takes place. Thank you very much, Your Honor.

THE COURT: I would -- I do just want to do a brief summary for the record here. I have read it, I find it's -- the first issue was, is the proposed settlement fair, reasonable and adequate? And we know it is for $3.9 million.

And the Court has to weigh a number of factors, and those factors include things as likelihood of success, and we have gone through this many times before on the likelihood of success. Plaintiffs, of course, are very optimistic, but

success is never guaranteed. The Court finds that the defendant acknowledges that it has risks also. And so therefore this result is fair to both sides.

The complexity, expense and duration of continued litigation, we already know how long, it has been referenced by counsel, the litigation has gone on. Certainly it is very complex and it is immensely expensive. So certainly it eliminates any future delays, future extensive expenses except for the distribution, and assures a substantial payment of the settlement class.

Judgment -- the judgment of counsel here and the amount of discovery, we know that substantial discovery has been done, we talk about it every meeting, so I don't need to go into that.

And the experience of counsel, counsel is well versed in these matters, well experienced in these matters, and the Court relies heavily on counsel, particularly after the year -- years of dealing with counsel.

In terms of the reaction of class members, we know there has been no objections after well over 3,000 notices went out. This was accomplished at arm's-length negotiation. I think all together, the Court finds that these factors are more than sufficient to show that this was a fair and adequate resolution.

The notice -- I do have the report of the notice

that was filed by the class counsel on dissemination, and I find that the notice was disseminated in a reasonable manner to all class members or proposed class members in as reasonable a manner as could be both by direct mail and by internet and advertisement.

The class should be certified. It was preliminarily certified. It should be certified pursuant to Rule 23. Certainly it is a very numerous class, over 3,800 direct purchaser entities.

The questions of law and fact are common to the class. Antitrust price-fixing conspiracy cases by their nature deal with common legal and factual issues about the existence, scope and effect of the conspiracy.

Typicality, the proposed class representatives can satisfy the prerequisite if the claim arises out of the same event or practice. And here typicality is satisfied because the direct-purchaser plaintiffs' injuries arise from the same wrong that is allegedly -- that is allegedly enjoining the class as a whole.

Adequacy of representation, there is adequacy of representation by both the named plaintiffs the Court finds and also -- and I say it is adequate because the plaintiffs all have the same common factual dispute -- dispute here, and the representative parties will fairly and adequately protect the interest of the class.

And the direct purchasers' representations are through counsel. The Court has already referenced the qualifications of counsel and I believe that the whole class would be adequately represented by them.

The Court determines that these claims involve the single conspiracy from which the settlement class members arise, and the evidence shows the violation occurred as to -- a violation that occurs as to one settlement class member shows a violation that occurs to all and is common to all.

The Court finds that the class action is a superior method here to determine this, these cases, because the interest of the members of the class in individually -- in individually controlling the prosecution of separate actions, that protects that, and the extent and nature of other litigation about the controversy by members of the class, and the desirability of concentrating the -- the litigation in a particular forum, and also the difficulties likely to be encountered in management of the class action.

And considering all of these factors in centralizing, with the case centralized in this Court, the Court finds that this is a very efficient way of handling this class, this group of plaintiffs.

The Court also notes that the parties are asking for 20 percent, which at first sounded like a lot, but then when you look at the size of the settlement, that's 780,000.

And from what the Court notes by examining the records in this case of the expenses and fees, which are not at issue here, but in terms of the expenses, finds that to be a reasonable amount and the Court will award that for expenses. Obviously, Counsel, correct, any balance on that goes into the pot for the plaintiffs, right?

MR. KANNER: That's correct, Your Honor.

THE COURT: Thank you. So the Court does approve the final settlement and certifies the class and class counsel and grants the request for the litigation costs.

Okay. I think that's it. If you submit the orders, the Court will sign them.

MR. KANNER: Thank you very much, Your Honor.

THE COURT: Thank you.

Okay. The next matter is -- I don't know how to pronounce this -- Faurecia Emissions USA's motion to dismiss. That is 6-C-3 on the agenda. All right. Counsel?

MR. IWREY: Good afternoon, Your Honor. Howard Iwrey from Dykema on behalf of Faurecia Emissions Control Technologies, USA, LLC. Fortunately I will refer to them here as FECT, F-E-C-T.

Before I begin, we will be dealing with information that's -- was deemed highly confidential and sealed in the complaint. I will try to just limit it to the years they were operating and not identify people or meetings.

THE COURT: If you do and it's confidential, you're going to have to say that --

MR. IWREY: Right.

THE COURT: -- it's confidential, and we can excuse anybody in the courtroom as long as you let me --

MR. IWREY: Well, if it is okay with plaintiffs who marked it confidential, I will only refer to the years.

UNIDENTIFIED ATTORNEY: Okay.

MR. IWREY: And does anyone from Tenneco object to just providing the years?

UNIDENTIFIED ATTORNEY: No.

MR. IWREY: Okay. Well, that makes life easier.

THE COURT: Okay.

MR. IWREY: Thank you.

A brief introduction is appropriate. FECT is an indirect subsidiary of Faurecia USA. There is but one lonely allegation against FECT in the complaint, and it states in pertinent part that FECT made and sold exhaust systems. Plaintiffs have failed to plausibly connect FECT to the alleged conspiracy and therefore FECT should be dismissed.

A key point I will address here is that the only factual allegations regarding conspiratorial activities discuss conduct that occurred between 1998 and 2006. The problem for plaintiffs here is that FECT was formed in March of 2007. Therefore, FECT could not have possibly

participated in the alleged conspiracy or even competed in the market during that time.

Another key point I will address here, and you have heard this line before, Your Honor, this case is unlike any of the other cases in the MDL.

THE COURT: They are all so unique.

MR. IWREY: They are -- everybody is special, everybody is unique. But our uniqueness here is something that you hinted on in the argument with Green Tokai. And that difference is, unlike any of the other cases, there has not been a guilty plea anywhere by FECT, by any Faurecia entity, by any other defendant, or by any executive of any defendant, and this holds true not only for the parts at issue here, exhaust systems, but any other product. So no plea, nowhere, no party, no part.

These key defects likely explain two other things that have transpired: First, after our motion to dismiss was filed, plaintiffs moved to amend the complaint to add additional Faurecia entities.

Second, plaintiffs filed a whopping three-page response here. That also may be a unique fact. Their response was three pages, Your Honor. Plaintiffs obviously recognize that FECT is not a part -- a proper party.

And that's why we are asking you to dismiss FECT now. Then we can move on to consider the amendment, the

proposed amendment that is, and, if appropriate, test the sufficiency against the three new Faurecia entities.

Now I would like to jump into more detail. First, the Sixth Circuit in Carrier requires that plaintiffs must specify how each defendant was involved in the alleged conspiracy. As noted, the only allegation discussing FECT at all was that it made and sold exhaust systems, but that's not sufficient as a matter of law.

Second, the factual allegations on their face that they call illustrative examples actually show that we couldn't have participated in the conspiracy.

Now, let's assume, contrary to the case law, that these allegations that just discuss Faurecia, without identifying what Faurecia entity, but let's set that aside and let's assume that they can get away with that. Even if we credit those allegations against FECT, the only conduct they discussed was 1998 through 2006. And, again, it is beyond dispute that FECT did not exist until March of 2007. So based on those factual allegations, it was literally impossible that FECT could have participated in the alleged conspiracy or obviously that FECT competed in the market or even made or sold exhaust systems.

This sounds strikingly familiar because, Your Honor, in MELCO and Fujikura America in their motions to dismiss -- and in those cases I would add there were guilty

pleas -- but the Court dismissed those two parties because they didn't compete in the market at the time of the alleged wrongful activities. FECT is in that exact same position and should similarly be dismissed.

Now, let's see how plaintiffs respond to this fatal defect in their three-page response. They argue, well, these factual allegations are just illustrative but not exhaustive examples. But of we -- as we have shown, these illustrative examples on their face show that FECT could not have participated.

What the plaintiffs are asking you to do, Your Honor, is interesting. They are assume -- they are asking you to assume facts that are out there about the alleged conspiracy that they have not pleaded. In other words, they want the Court to take their word that something else out there exists on FECT, but they are not going to tell anybody. That's even worse than those alternative facts we've heard about over the weekend. These are not alternative facts -- I had to get it in -- these are not alternative facts; these are non-facts.

Plaintiffs cite to no law supporting their theory that allegations about other companies' actions should be enough to plead a conspiracy that is unlimited in scope, unlimited in the number of participants and unlimited in length.

While this Court has previously held it wouldn't limit the scope of a conspiracy set forth in a guilty plea, it has not said that, in the absence of a guilty plea, a party is entitled to the inference of a virtual limitless conspiracy based on these illustrative examples. If plaintiffs can get away with this pleading ploy, they would have a clear example -- incentive not to allege relative facts, toss off a few factual allegations, call them illustrative examples, and then rope in virtually everyone in the industry.

So, Your Honor, in light of the fact that the illustrative examples, the only factual allegations in the complaint show that FECT could not possibly have participated in the conspiracy, the only conclusion you can draw is that there are no allegations showing that FECT participated and it should be dismissed.

There is even further reason to dismiss FECT. The proposed amended complaints that were submitted by EPPs and dealers were submitted with a motion to amend that was filed after our present motion to dismiss was filed. The proposed amendment, however, does not make any further allegations about FECT's role even after plaintiffs knew about the defect. Plaintiffs specifically admit in the motion to amend that the proposed -- proposed amended complaints do not contain substantive allegations that are relevant to the

present defendants. Now, if plaintiffs have any substantive allegations out there against FECT waiting in the wings that would cure this defect, clearly they would have raised them in the proposed amendment. They didn't.

There is yet another reason. As you heard earlier, plaintiffs specifically alleged in the complaint in a footnote that they have received confidential information about the alleged conspiracy, and on page 24 of the response to the Faurecia SA motion, plaintiffs state that the leniency applicant was their source.

Now, after having the benefit of access to the leniency applicant, all plaintiff alleged about FECT is that it made and sold exhaust systems. If plaintiffs had factual allegations implicating FECT, they would have included them in the original complaint or, at the very least, in the proposed amended complaint that was submitted after our motion. They did not, and this is further reason for the Court not to take the word or speculate that there are these unpleaded factual allegations out there.

And finally that leads to my last point. What makes this case again unique is that there is no guilty plea to prop up plaintiffs' conclusory and insufficient allegations. We point out at page 3 of our motion to dismiss that the presence of a guilty plea by at least one party has been essential to all of this Court's prior opinions holding

that alleged conspiracies were at least plausible. The Court has noted time and time again that it will look beyond the allegations standing alone to the guilty pleas because those guilty pleas demonstrate an express agreement. We do not have that here. There is no guilty plea to assume an express agreement or permit the Court to look beyond the factual allegations, and as noted, the only factual allegations show that FECT is entitled to dismissal.

And I would like to read from Your Honor's opinion granting MELCO's motion to dismiss because it really summarizes this approach. The Court has allowed other plaintiffs' classes to proceed against defendants in light of allegations of guilty pleas against other suppliers in the same market.

It has allowed plaintiff classes to proceed against defendants in light of guilty pleas specific to a particular country when the same product market was involved as well as an overlap of defendants.

It has allowed plaintiff classes to proceed against defendants involving products other than the limited product involvement specified in the guilty plea.

And that's from your December 30th, 2015 opinion, docketed at 93 in Case No. 14-14451.

Here, as you know, we have none of these situations; no plea by no defendant, no part, nowhere.

And I would also add the following: No executive of FECT or any other defendant has pleaded guilty to any conspiracy involving any part in the U.S. or anywhere else. No parent subsidiary or affiliate has pleaded guilty. And the three Faurecia entities that plaintiffs propose to add in their amended complaint have similarly not pleaded guilty to any conspiracy.

And what do plaintiffs say in their three-page response brief about this point? Absolutely nothing. And as Mr. Reiss stood here just a few minutes ago and said, if you don't argue it in your principal brief, you have waived the claim. They completely ignored it.

So as far as FECT is concerned, there is no -- the only factual allegation about FECT was that it made and sold exhaust systems. Plaintiffs' complaint has to live and die on its factual allegations that it has made, and these illustrative examples of factual allegations prove that FECT should be dismissed.

And finally I would like to address the last point where plaintiffs plead that the presence of a motion to amend should somehow stop you from deciding this motion here today. The proposed amendment does not cure any of these defects; it only adds three additional parties. The plaintiffs admit that there is no substantive allegations. So regardless of whether the Court ultimately permits this amendment, the

claims against FECT should be dismissed here today.

And as we noted in our opposition to the motion to amend, FECT has no opposition to allowing the amendment so long as FECT as well as Faurecia SA are dismissed. And it was improper of plaintiffs to wrongfully accuse of us improperly opposing the amendment because what we said is we will allow you to amend so long as we have the opportunity to test the pleading against the three added defendants, but you've got to dismiss FECT and Faurecia SA because you have no claims against them.

And therefore we specifically request that FECT be dismissed with prejudice at this time and then we'll move on to the amendment.

THE COURT: All right.

MR. IWREY: Thank you, Your Honor.

THE COURT: Response?

MS. CASSELMAN: Good afternoon, Your Honor. My name is Jill Casselman. I'm with Robins Kaplan, and I represent the end payor plaintiffs.

THE COURT: How do you spell your last name?

MS. CASSELMAN: C-A-S-S-E-L-M-A-N.

THE COURT: Okay.

MS. CASSELMAN: And for purposes of the motion, I'm arguing on behalf of auto dealers as well.

MR. IWREY: Could you speak up a little bit or

closer to the mic?

MS. CASSELMAN: Sure.

MR. IWREY: Thank you.

MS. CASSELMAN: Just hold on, I want to move forward. Is this okay?

MR. IWREY: Yeah, thanks.

MS. CASSELMAN: FECT USA is asking this Court to impose an impermissibly high standard on a motion to dismiss, and they are doing it based on an unfairly narrow reading of the complaints. To survive a motion to dismiss, a plaintiff need not specifically allege which defendants participated in which action in support of their claims, they needn't include a list of examples of illegal conduct throughout the conspiracy period, and they needn't allege guilty pleas.

The motion to dismiss standard is, and has always for all of the motions we have been hearing today and previously been, whether we have plausibly alleged that FECT USA participated in the conspiracy, and we have done that. We have done that in a manner that this Court has repeatedly affirmed is acceptable on a motion to dismiss by alleging market factors such as high barriers to entry into the market, inelasticity of demand, high concentration, and et cetera. And we have alleged the existence of an amnesty applicant, Tenneco, which has come forward to the authorities and said I participated in this conspiracy with someone,

which is --

THE COURT: And though they have not pled guilty, they have to admit guilt, right, to be an amnesty defendant?

MS. CASSELMAN: Correct, they have to admit that they participated in a -- in a price-fixing cartel of the exhaust systems with somebody. And I say with somebody because we have illustrative examples of who those somebodies are, and those are in our complaint and they're confidential so I won't go into sufficient -- into much detail. But we also have these illustrative examples which cover, as counsel said, a certain period of time through 2006.

Now, as I understand it --

THE COURT: That wasn't established until 2007, so how do you tie them in?

MS. CASSELMAN: Correct. So the main point of this argument is there is no conspiracy after the date of the illustrative examples. That's not what we allege at all, and a fair reading of our complaint in which we allege an ongoing conspiracy makes it clear that we are not saying at -- as of the date of the last example, everybody disbanded and went home. They absolutely continued to participate. And we have alleged that Faurecia -- Faurecia and FECT USA participated in the conspiracy throughout the conspiracy period on -- on an ongoing basis. And those illustrative examples are simply the examples we were able to put forward without the benefit

of formal discovery.

And there is no -- there is no case that -- that defendants have cited that says that an illustrative example is narrowing of what your complaint -- your complaint alleges. Our complaint fairly alleges an ongoing-basis conspiracy which absolutely includes the post-2007 period when FECT USA was formed. And --

THE COURT: Do you have any facts to support that or just the fact that -- just the fact that they produced a product that was involved in the conspiracy by your illustrative examples prior to that?

MS. CASSELMAN: Yes. So I -- our position is that we have to live by our complaint. We do live and die by our complaint but luckily not by defendants' characterizations of our complaint in which we have alleged an ongoing conspiracy with participation of the Faurecia Group.

And we also have alleged at paragraph 74 of the EPP complaint and I believe paragraph 58 of the ADP complaint that one or more employees or agents of entities within that corporation -- corporate family engaged in conspiratorial acts on behalf of every company in that family, and that the participants entered into agreements on behalf of their respective corporate families, and that the participants did not always know the corporate affiliation of their counterparts nor did they distinguish between the entities in

the corporate family.

So when you take our complaint as a whole, all of these allegations together, which is where we disagree with Faurecia who is trying to pick them apart into specific allegations where we named FECT USA, we have alleged a plausible conspiracy that began at the beginning and went well past 2007 in which Faurecia participated, and we believe that includes Faurecia -- FECT USA employees who may have been participating in another part of the Faurecia Group prior to 2007, but they were probably -- we allege they were participating after on behalf of FECT, FECT USA.

And just a quick point about the length of our opposition brief, Your Honor. I don't know if you've heard the saying, you know, if you give me a week I can give you a ten-page brief; you give me two weeks, I can give you a five-page brief. Brevity is a -- brevity is a virtue. We -- we got the points in quickly. But I think that the point here is that we are not trying to say we have all of the benefits of discovery and we know exactly the who, what, where and when, but we don't need to say that on a motion to dismiss. We just have to allege a con -- a conspiracy that is plausible that this entity participated in.

I believe that our -- our allegations regarding the Faurecia Group and defendants generally, which are, you know, hundreds of mentions of defendants and Faurecia which FECT

USA would like the Court to discard, are absolutely relevant. We are supposed to be able to plead in an efficient manner the claims against all of the defendants. And, you know, I personally find these complaints to be long. Can you imagine how much longer they would be if we had to list out every single entity that we are pursuing in every paragraph in which we are alleging something?

THE COURT: You said that or implied that because they were part of the -- the defendant group, you know, if one person does it, the whole group does it, is that what you are saying?

MS. CASSELMAN: Well, in paragraph 74 of the EPP complaint and paragraph 58 of the ADP complaint, we allege that the employees that participated did so on behalf of the entire group because they have shared interests, but we also alleged that the counterparts in the other companies that they are meeting with didn't necessarily know their affiliation. And so at this time we don't know, even based on the benefits of amnesty applicant information, whether or not Faurecia Group entities were employees of FECT USA or whether at Faurecia SA. There -- there is some stuff that discovery needs to bear out. And so for this time, our allegations, fairly read, taken as a whole, do make it plausible that FECT USA participated in the post-2000 time period or 2000 and post.

So I think that the -- the point is we don't have all of the information, but the Court has not required more than we have alleged in prior motions to dismiss. As one example, in the bearings case, which I believe Mr. Iwrey is familiar with, his client, SKF USA, moved to dismiss saying that you have only alleged participation by the parent entity.

And in denying that motion to dismiss, this Court said the plaintiffs do not need to detail specific conduct of subsidiaries so long as the allegations as a whole create an inference that the subsidiaries participated. And I believe that's what we have done here, and the -- the allegations and the narrow reading of the complaints to suggest otherwise is not the standard on a motion to dismiss.

THE COURT: Okay. What -- when was the amnesty applicant, with did he apply for amnesty?

MS. CASSELMAN: Your Honor, let me see. I don't know that date off of the top of my head. I'd be happy to look that up.

THE COURT: We know in November of 2014 it reported it publicly.

MS. CASSELMAN: So I would imagine sometime prior to that. I don't know.

THE COURT: Okay.

MS. CASSELMAN: Okay. Thank you, Your Honor.

MR. IWREY: May I respond, Your Honor?

THE COURT: Mr. Iwrey, yes.

MR. IWREY: Thank you.

First of all, in the SKF case, there were guilty pleas by parties, number one.

Number two, SKF, in fact, existed at the time of the alleged behavior. Here, in stark contrast, the only facts that are alleged were before FECT even existed.

I will address short -- the -- briefly the allegation in paragraph 74: You don't have to allege the specific if you allege the corporate family.

First of all, I would cite the TFT LCD case, 586 F. Supp. 2d 1109, saying the general allegations as to all defendants or Japanese defendants or a single corporate entity are insufficient, number one. Number two, even if they were sufficient, the only factual allegations about the family were 1998 through 2006. So paragraph 74 doesn't get plaintiff over the hump.

A couple things --

THE COURT: Don't they say it continues, it goes on?

MR. IWREY: I will address that, Your Honor. They say it continues. I believe they said -- the dealer said it ends when it ended, when it stopped, and the play -- the end payors, they continue to the present time.

But there is no factual allegations of a couple things. They make the conclusory allegation that the conduct may have continued for some unknown time, but this does not plausibly allege -- if you look at the word continued, it doesn't allege that they joined any conspiracy. We know that FECT didn't join the conspiracy that was the only conspiracy they allege, 1998 through 2006, because FECT didn't exist. They also do not allege anything about FECT joining the conspiracy after it came into existence in March 2007. So there are no allegations anywhere in the complaint tying FECT to the alleged conspiracy, and the only factual allegations disprove that FECT could have participated.

THE COURT: Thank you.

MR. IWREY: Oh, and finally the leniency applicant, Your Honor, could I address that?

THE COURT: Yes.

MR. IWREY: As Mr. Reiss noted, plaintiffs did not raise the leniency applicant point in their response brief. We appreciated the brevity. They did not raise the point, they have waived that argument.

And in any event, there is absolutely no law supporting this unasserted argument that a court should look beyond the pleading if there is a leniency applicant. And, in fact, we find just the opposite in In Re: Capacitors case. In addressing the significance of the leniency applicant, the

Court in that case expressly held that a leniency applicant was not the equivalent of a guilty plea and indeed was, quote, a nonfactor in the court's analysis.

Thank you very much.

THE COURT: Thank you. All right.

The next one is the Faurecia SA's motion to dismiss.

MR. CALSYN: Faurecia SA, yes.

Good afternoon, Your Honor. My name is Jeremy Calsyn from Cleary Gottlieb for Faurecia SA.

I find brevity to be a virtue so I am going to be I think very quick today because I think our motion on personal jurisdiction is a lot like and very close to other motions you have seen before and granted.

I am going to just rest on the papers on the 12(b)(6) issues. I think those have been addressed well in the papers and a lot of the issues were just discussed. So rather than -- and for the sake of efficiency, I will just focus on the personal jurisdiction issues.

So just quickly, the -- the Court has repeatedly dismissed complaints against foreign holding companies that do not manufacture or sell products in the United States, and that's exactly what Faurecia SA is here. Faurecia SA is a holding company, it is based in France. It's been -- never been incorporated in the U.S., it has never had a principal

place of business in the U.S., never had offices, a phone number, an address in the U.S., and it has never paid taxes in the U.S.

This is exactly like the case where -- the case -- the -- the -- the decisions you issued in the bearings case for AB SK -- SKF and for Schaeffler AG and the Leoni AG case in wire harnesses where you had a holding company not active in the U.S., doesn't participate in the marketplace that is at issue here, doesn't really sell products; it just holds subsidiaries.

So I think here this should be, you know, relatively easy given that you've considered these issues over the last five years while I have been here.

THE COURT: All right.

MR. CALSYN: I think the only -- you know, the only other question is whether we have a subsidiary in the U.S. that's an alter ego of Faurecia SA. And I think here, you know, FECT is the defendant in the complaint that we have looked at here. FECT, as we have submitted in the declarations with our brief, FECT runs its own operations, runs its own business. There is no reason to believe that it's an alter ego.

You know, there are some cases that the plaintiffs have cited, and I think in one -- in -- in their opposition they say that, you know, where there is no declaration

supporting the -- the factual statements from the -- from the defendant, you should -- you should deny the motion. But here we did actually put in the declarations, so I will just point to those declarations.

So that's brief. Thank you, Your Honor.

THE COURT: Thank you. Response?

MR. OCHOA: Yes, Your Honor. Omar Ochoa on behalf of the end payors and auto dealers.

The -- the issue for jurisdiction is not as straightforward as my colleague would say to the Court. It is actually different from the decisions that this Court has issued regarding holding companies. So the --

THE COURT: How so?

MR. OCHOA: -- the allegation in our complaint, right, is that Faurecia SA manufactured, marketed, sold exhaust systems in the U.S., either directly or indirectly through its subsidiaries.

The -- the response to this from Faurecia SA is basically twofold: One, it is a holding company that doesn't manufacture or sell parts so it shouldn't be a defendant. And two, Faurecia SA is independent from FECT, right, the U.S. subsidiary that we just discussed right now that was created in 2007. That's its basis for saying why they are similar to previous holding companies that have been dismissed or where the Court has granted motions to dismiss.

But the problem is the twofold. One, the fact that Faurecia SA is a holding company doesn't preclude the Court from finding it has personal jurisdiction over it. The Court -- this Court and others have found personal jurisdiction over holding companies where the holding company acted on its own or through subsidiaries that it controlled. We cited a couple cases as examples for this.

THE COURT: Which subsidiaries does it control?

MR. OCHOA: Excuse me?

THE COURT: Which subsidiaries does it control?

MR. OCHOA: So this is -- so this is where -- where we get to. In the -- in the previous instances, the holding companies gave affidavits to the Court saying we don't market, sell the -- the product at issue in the United States and we don't have control over the subsidiary that's also named in the complaint.

They have done that again in this case, but as was mentioned earlier, FECT didn't come into existence until 2007. So there is a period of time, 1998 basically up until 2007, there are other subsidiaries, there are other people who are controlling operations in the United States. They haven't defined, explained their relationship to those subsidiaries or those U.S. operations.

And the information that end payors and auto dealers introduced shows -- in our response briefing shows

that the Faurecia's -- the group's operations in the U.S. are extensive. They have manufacturing facilities in Troy, Michigan, in Louisville, Kentucky. They were telling their shareholders from 2002 to 2006 that their sales of exhaust systems were growing in the United States.

THE COURT: Well, you have those -- those defendants but what about this one? Let's talk more specifically about the SA.

MR. OCHOA: Right. So -- so -- so I guess the point here is that Faurecia SA has not rebutted the allegation, all right, that they sold, manufactured, marketed exhaust systems through their -- through themselves or through their subsidiaries from the period of time before FECT. All right. They have given no explanation whatsoever what their relationship was to operations in the U.S. prior to the existence of FECT. And so in that regard, they have not rebutted plaintiffs' allegations, and because they haven't rebutted those, those must stand and the personal -- and the -- the factual allegations do support personal jurisdiction in that regard.

So, again, the -- the fact that, from the information we presented, that there have been extensive operations in the U.S. prior to FECT, there is no explanation from Faurecia SA what that relationship was, end payors' allegations stand that they sold exhaust systems directly or

indirectly through those subsidiaries prior to FECT.

THE COURT: Okay. Thank you.

MR. OCHOA: Thank you, Your Honor.

THE COURT: Reply?

MR. CALSYN: Thank you, Your Honor.

Just two points. I think Mr. Iwrey referenced the point about you have to be more specific than just talking about the group or the defendants or even one -- one entity generally, and I think that's also the response here.

Second, there is really no -- there's no allegations in the complaint about these other entities. If we knew who the other entities were, we'd look at it, we'd -- we'd investigate, we'd see if we can write the same declaration, but we know -- we know where the allegations are and that's what we have addressed here.

I don't think there should be -- I don't think I -- I know of a case or know of a case here in this case, in -- in our auto parts matter, where you have had to go through every subsidiary, every entity that exists. I think in the past you have -- you have respected the corporate structures, and I think here we are just like those cases where the motions have been granted before.

THE COURT: Okay.

MR. CALSYN: Thank you.

THE COURT: Thank you.

The next one is Bosal.

MR. DE WAARD: Good afternoon, Your Honor. Ron DeWaard of the Varnum firm for Bosal Industries Georgia, Inc.

We do plan to go into in my argument a fair amount about the illustrative example, at least in two particular programs; well, the only two programs that are alleged in connection with Bosal. And so I do think it -- it definitely will raise the issue of the confidential information, so it is probably appropriate that the courtroom would be cleared except for the defendants in this particular case.

THE COURT: Do we have anybody in here? Well, you're in the case.

UNIDENTIFIED PERSON: Referring to the auto parts case?

MR. DE WAARD: No, the case that is alleged against Tenneco and Faurecia, Bosal and Meritor.

(Non-designated parties were excused from the courtroom for the following confidential proceedings:

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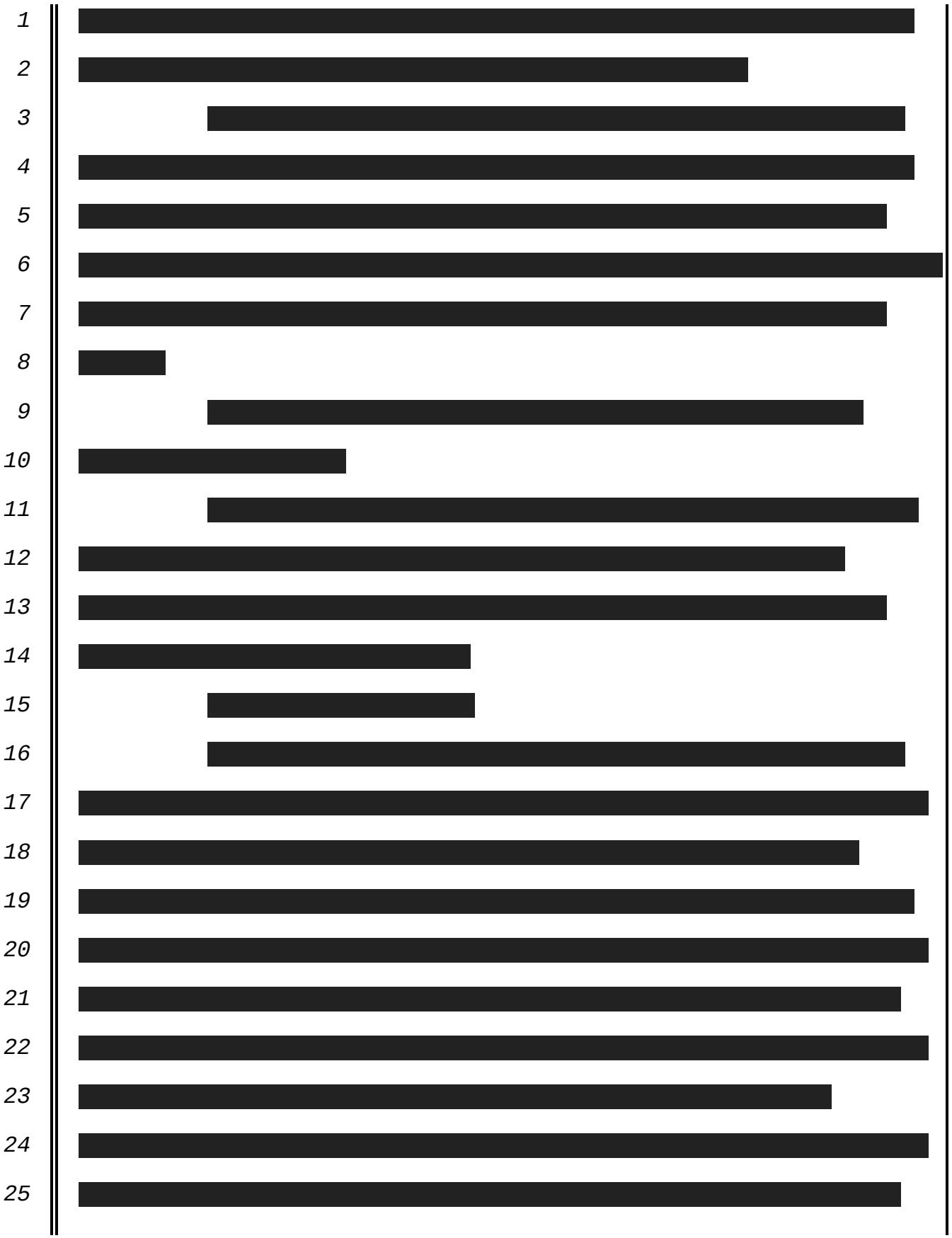

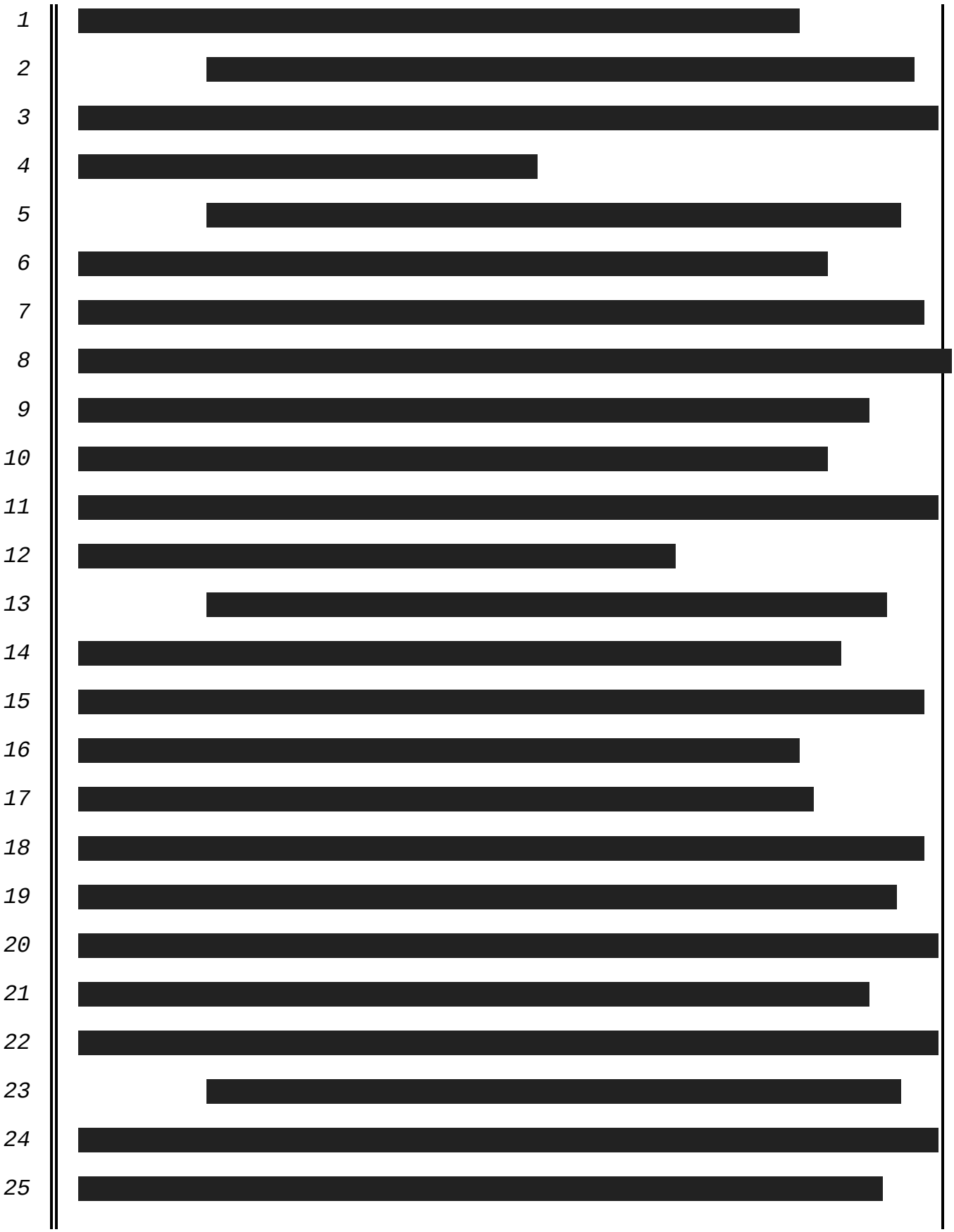

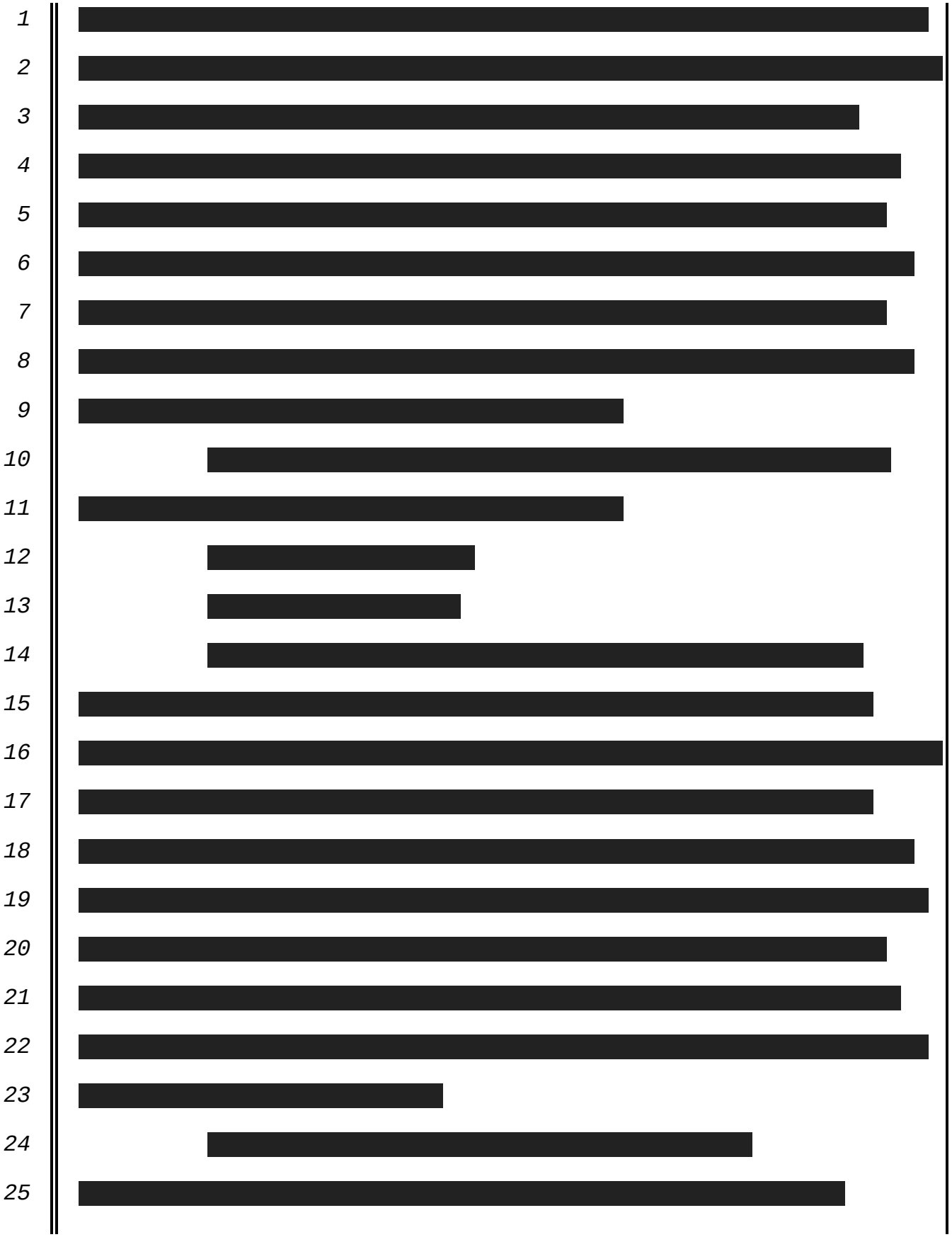

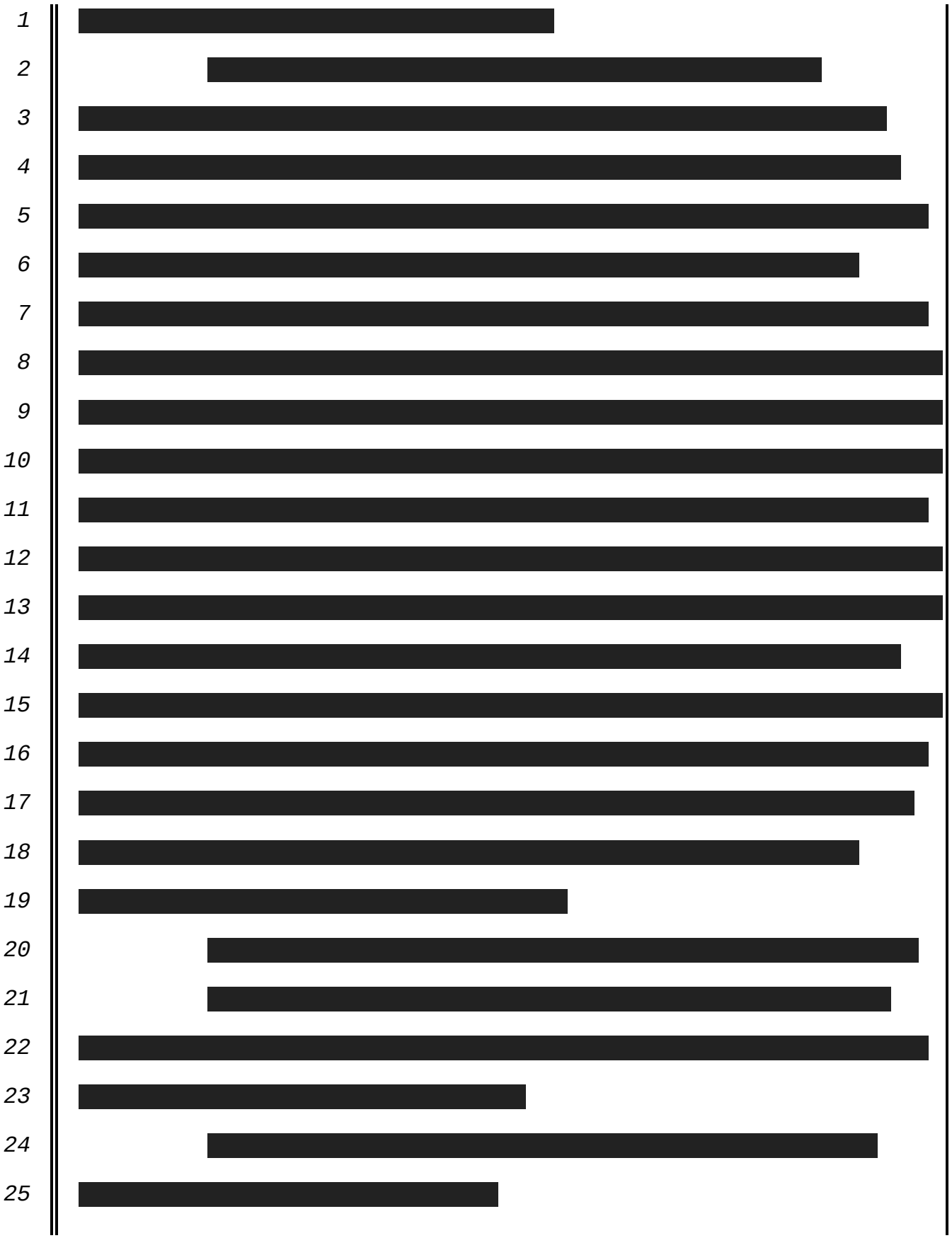

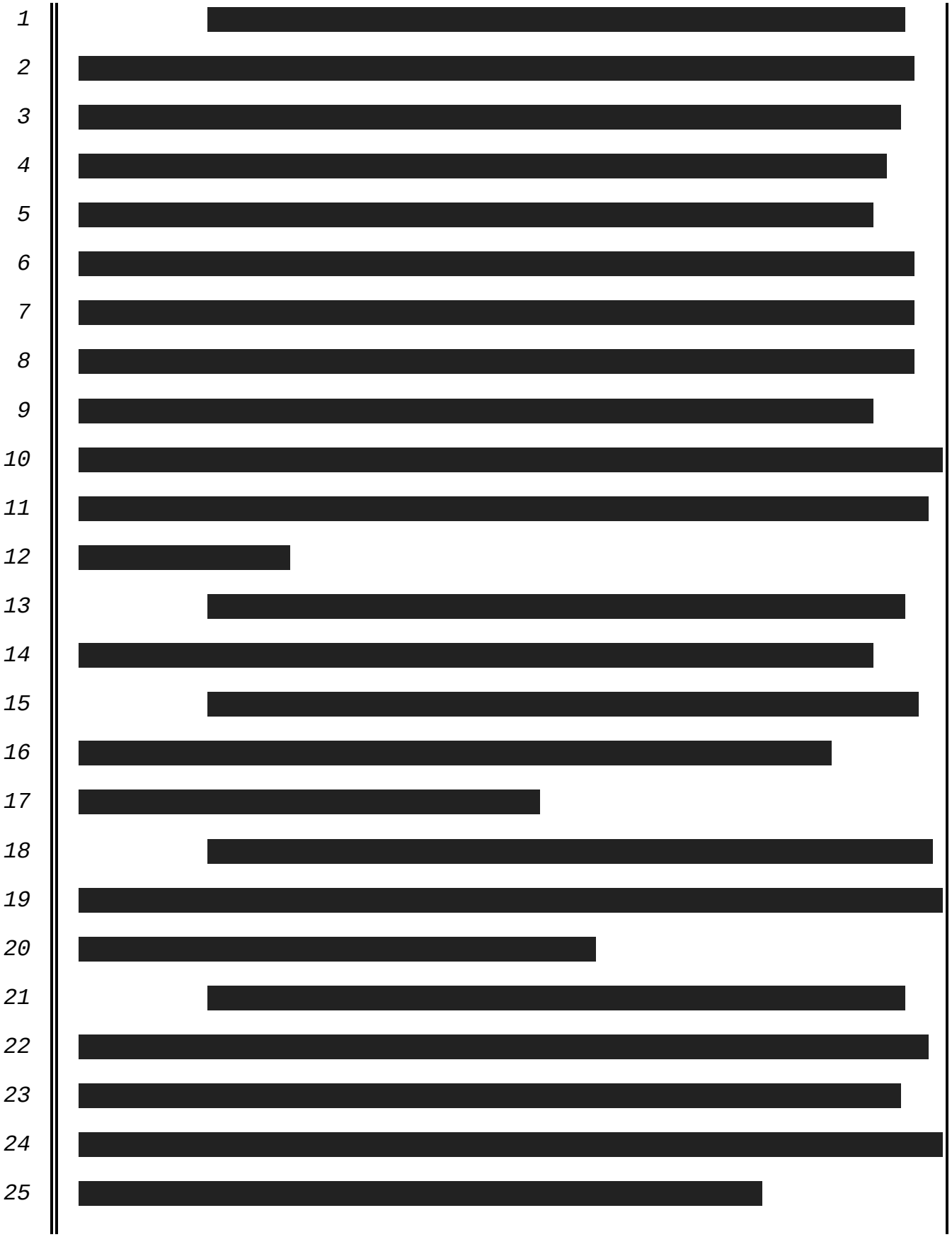

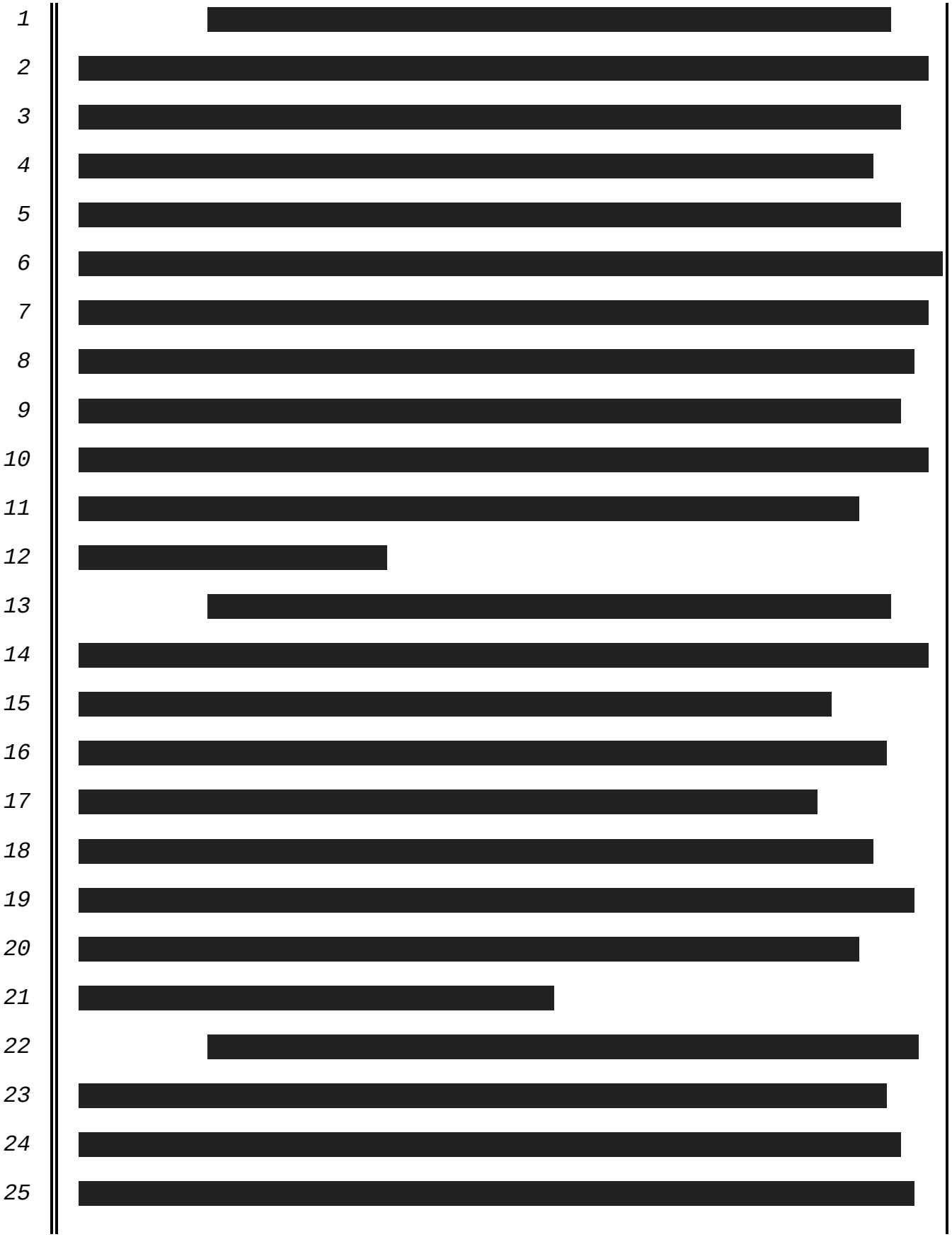

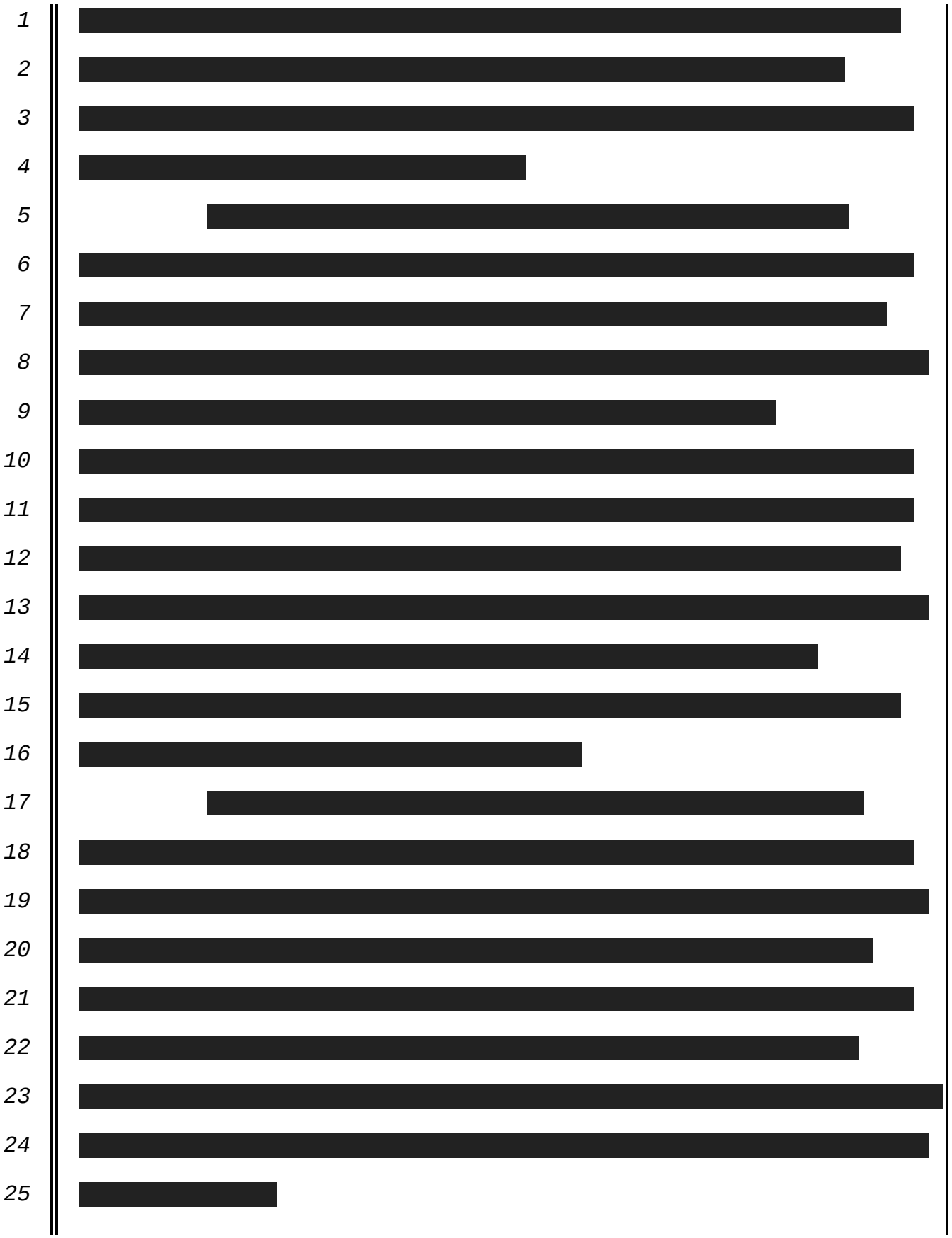

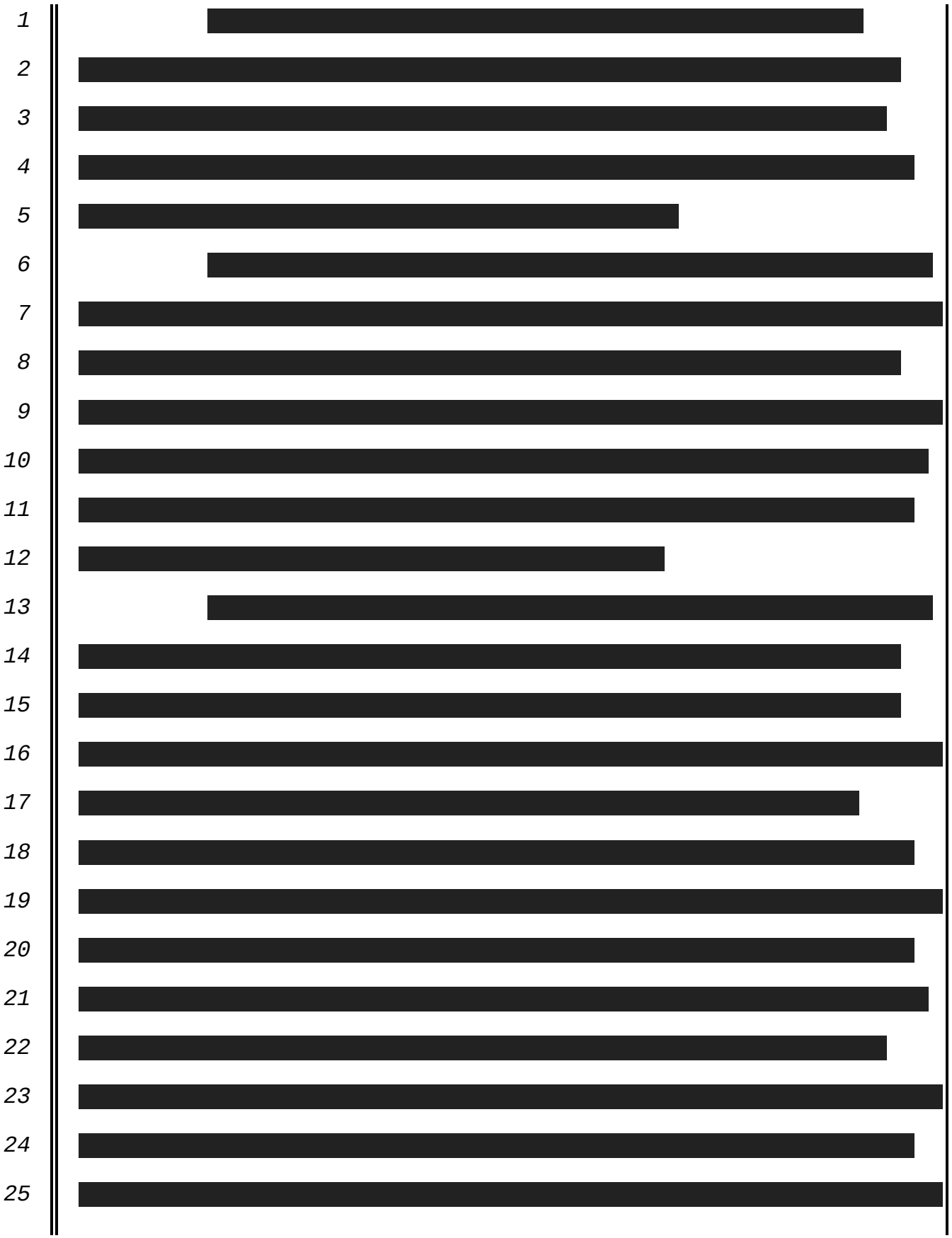

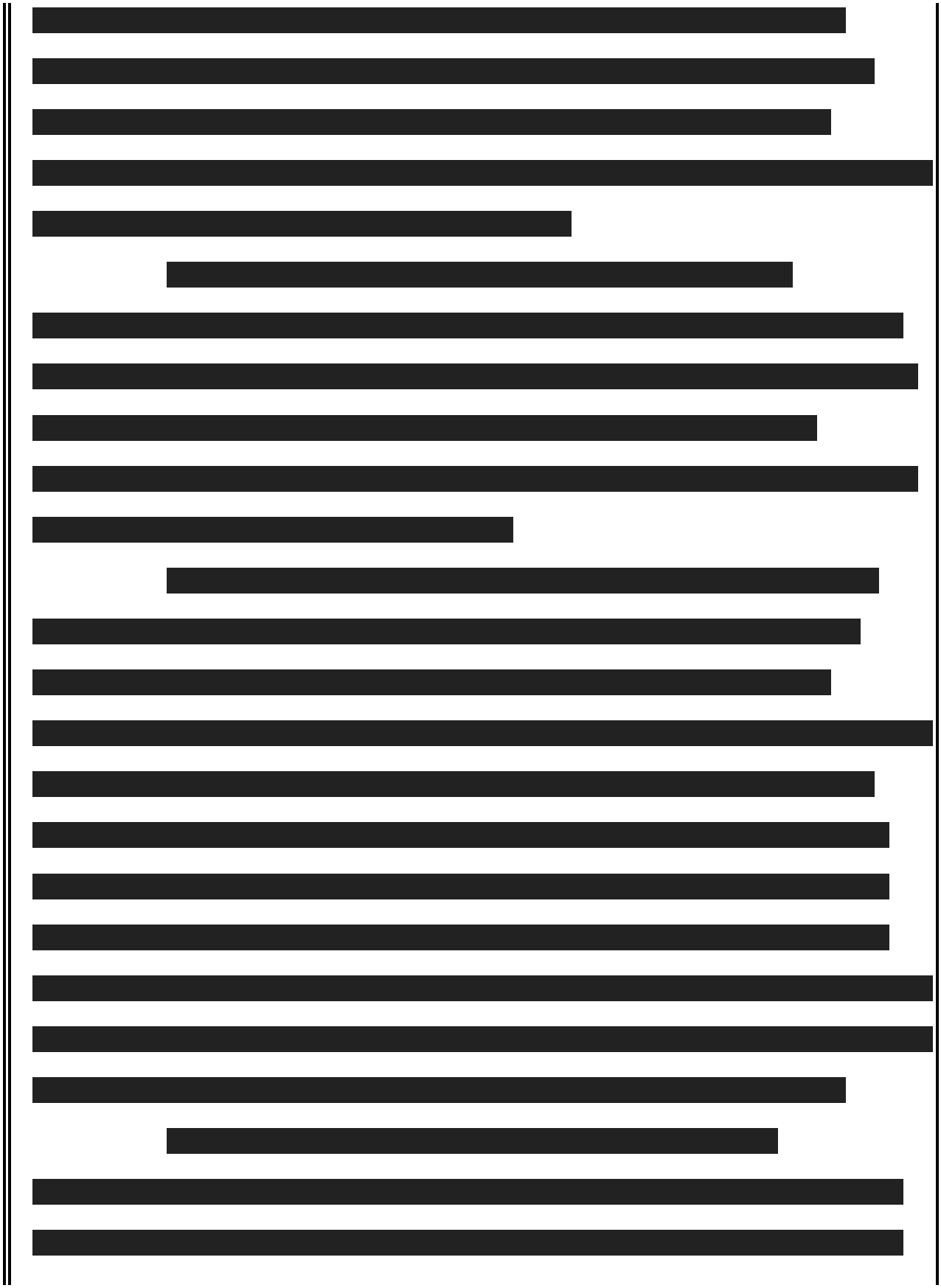

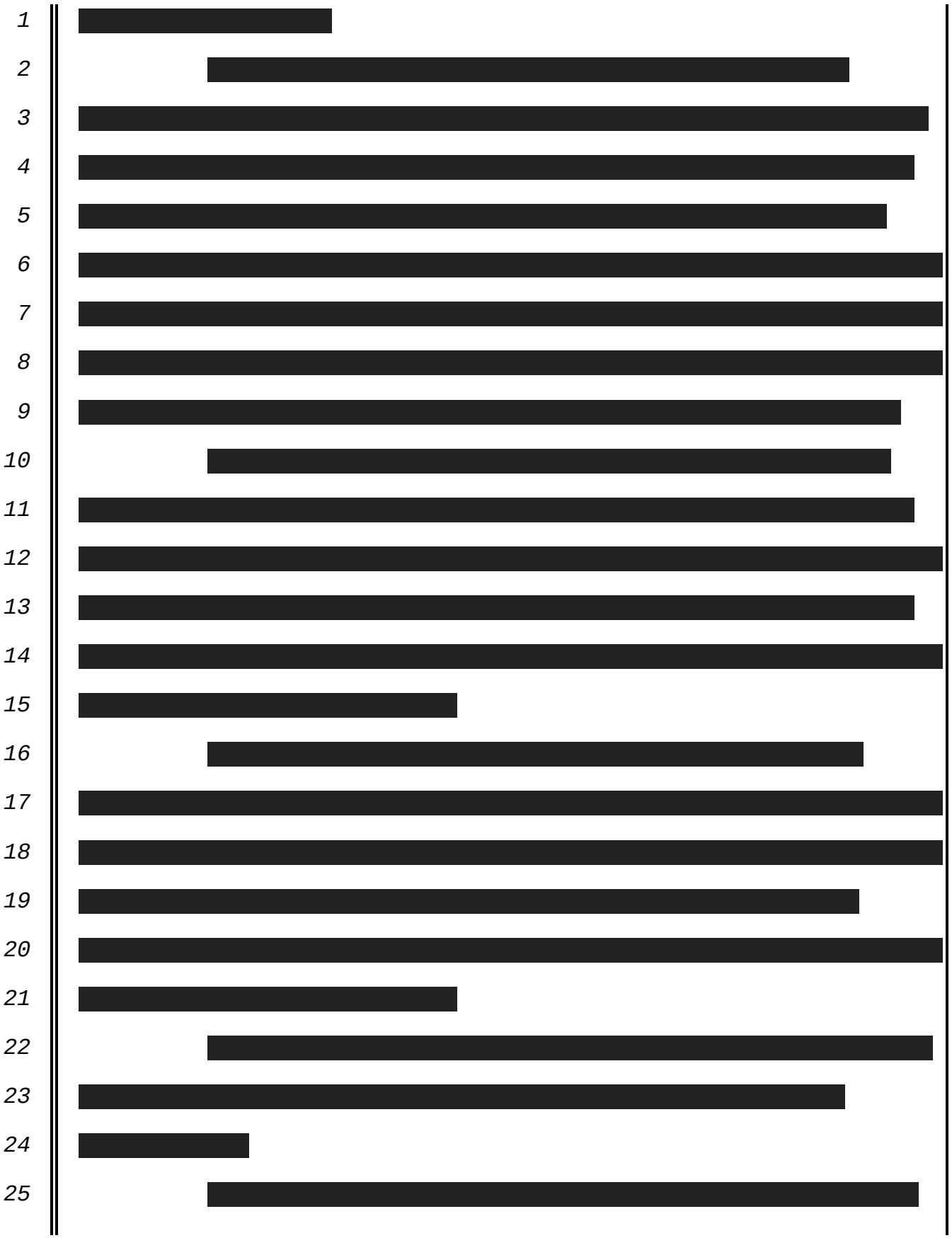

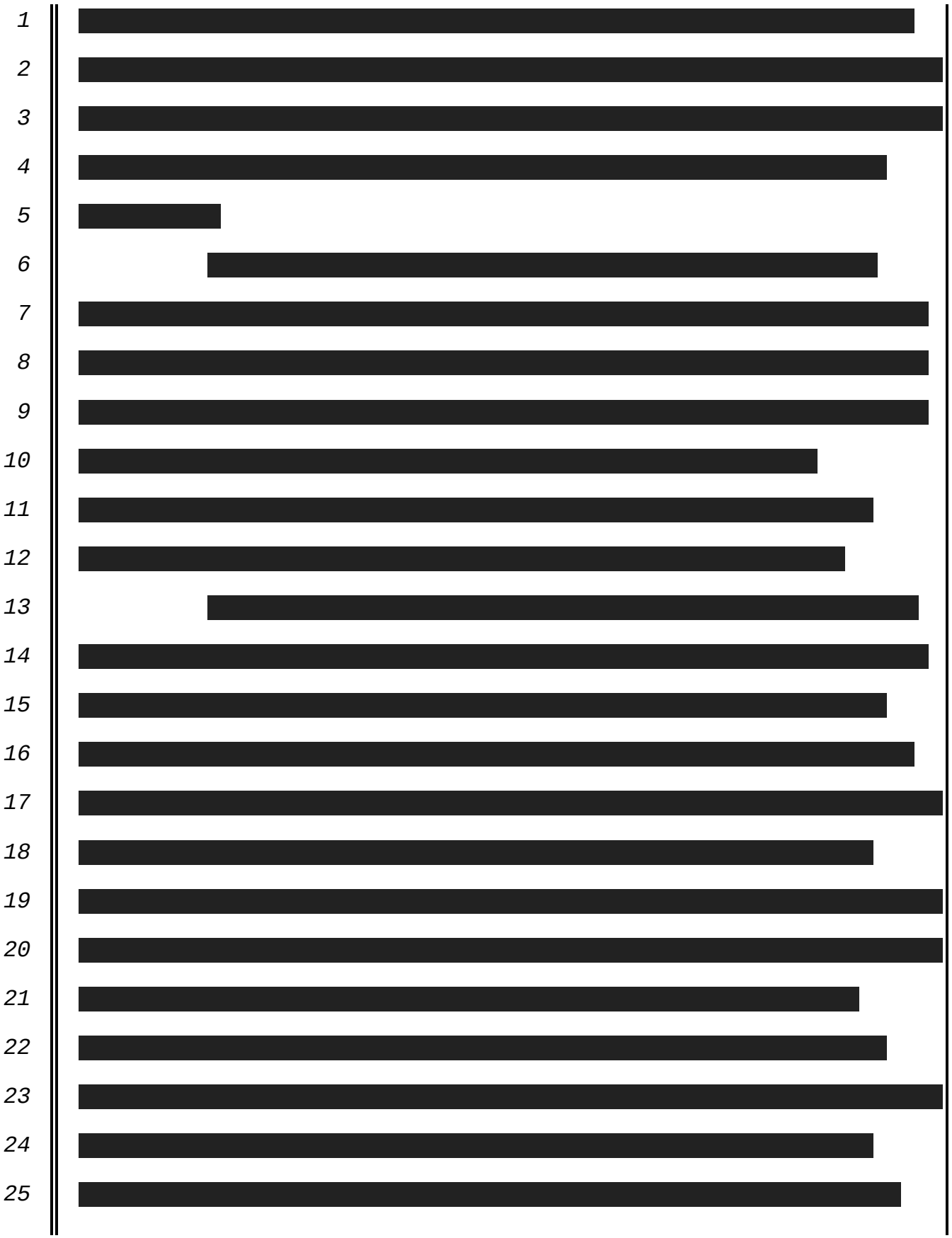

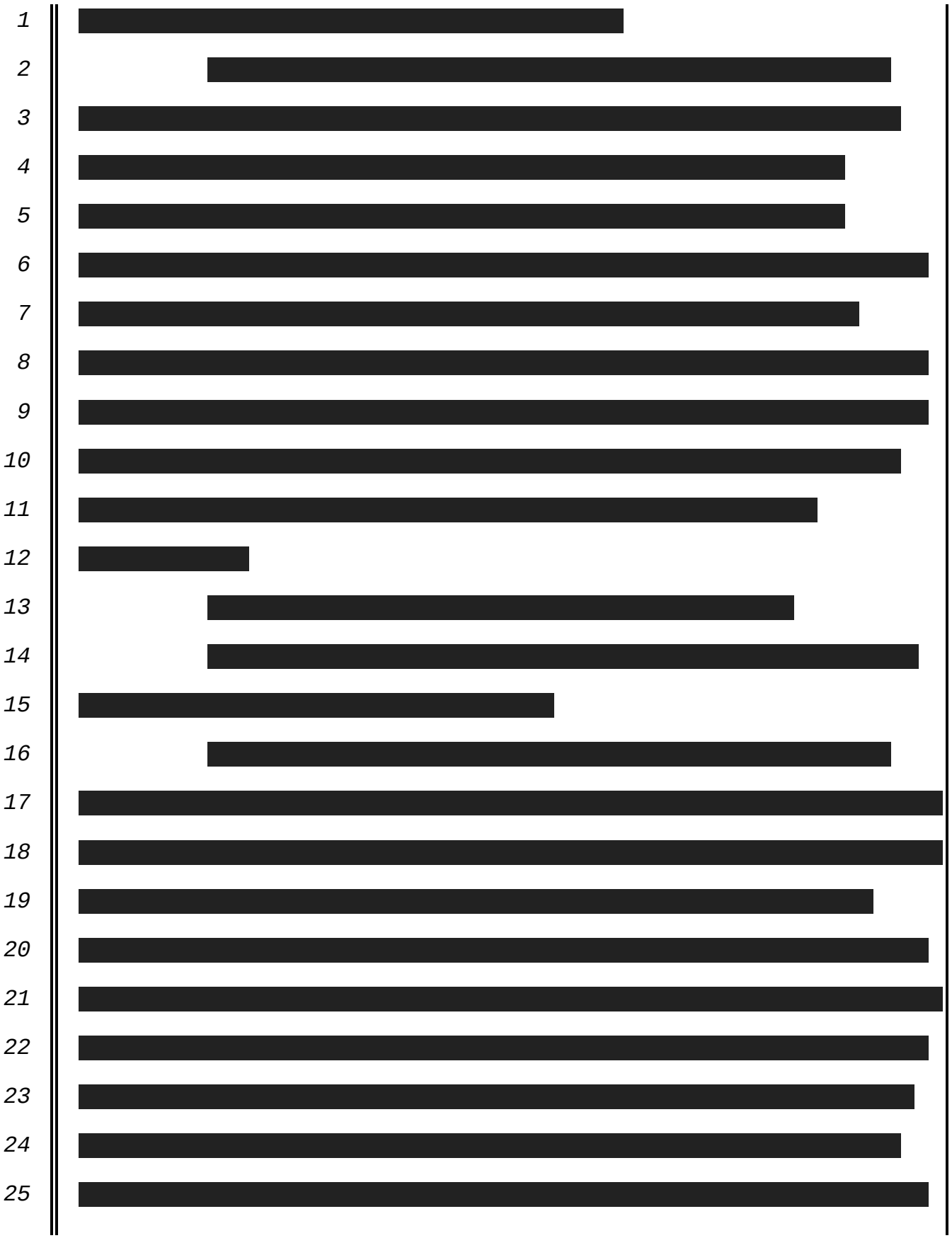

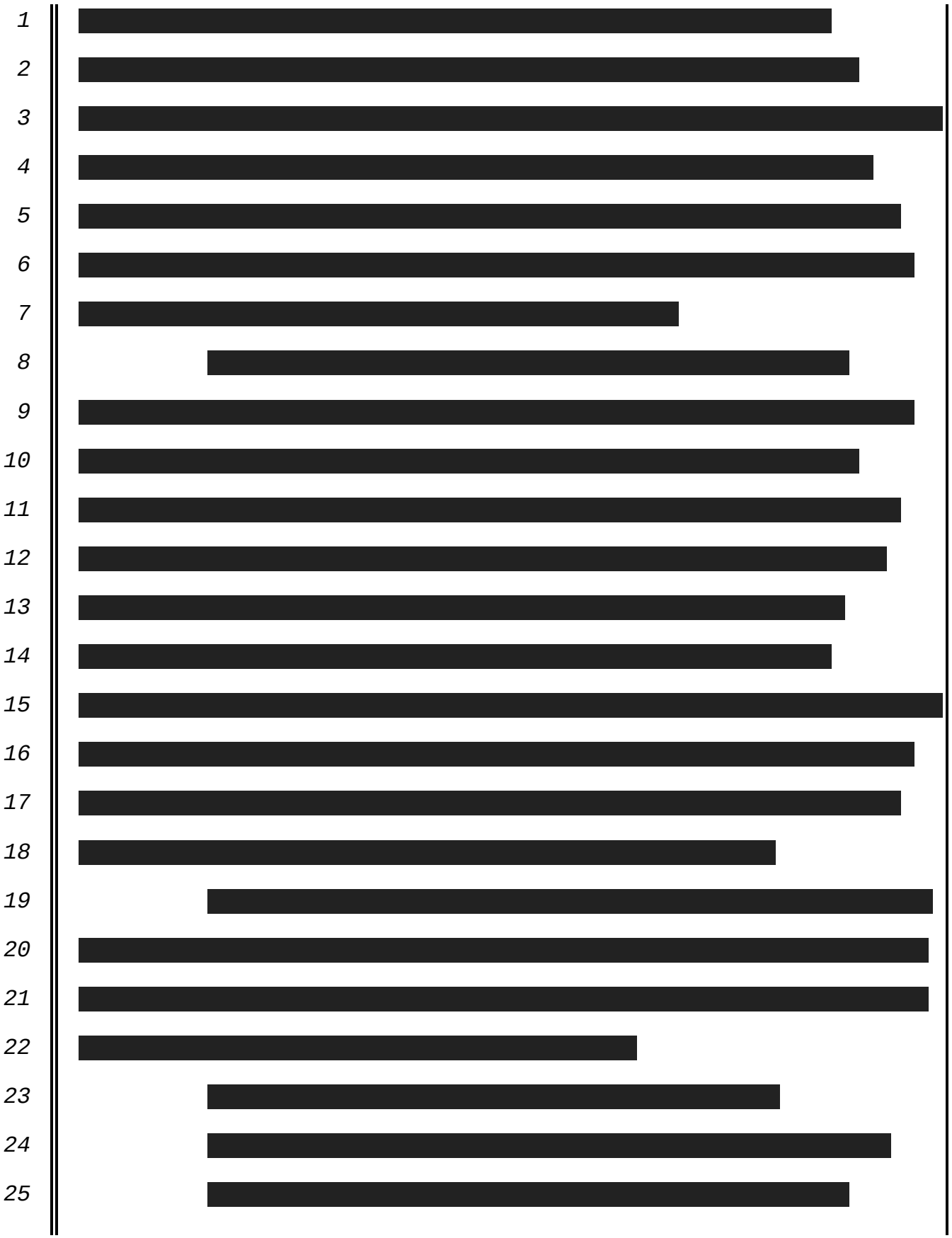

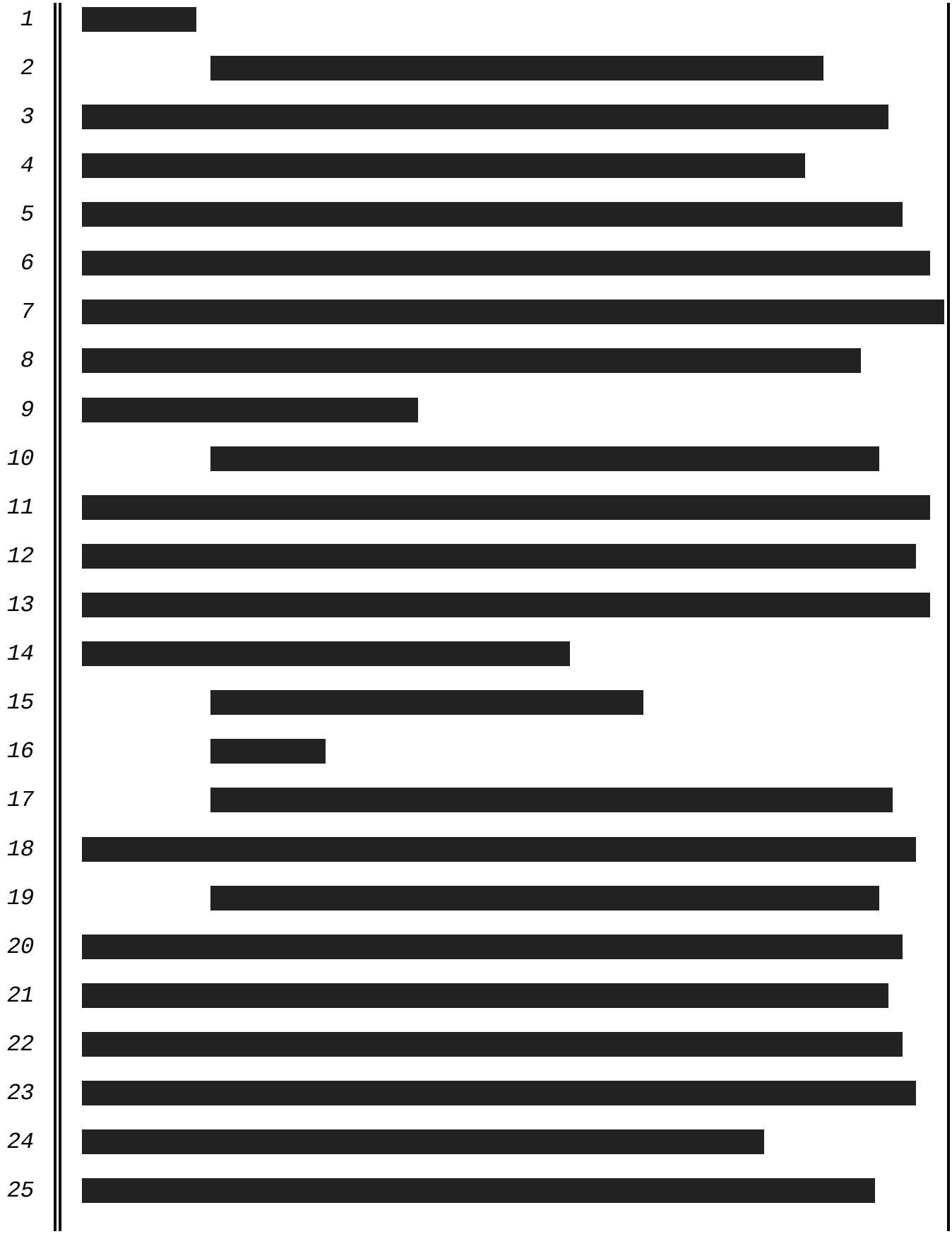

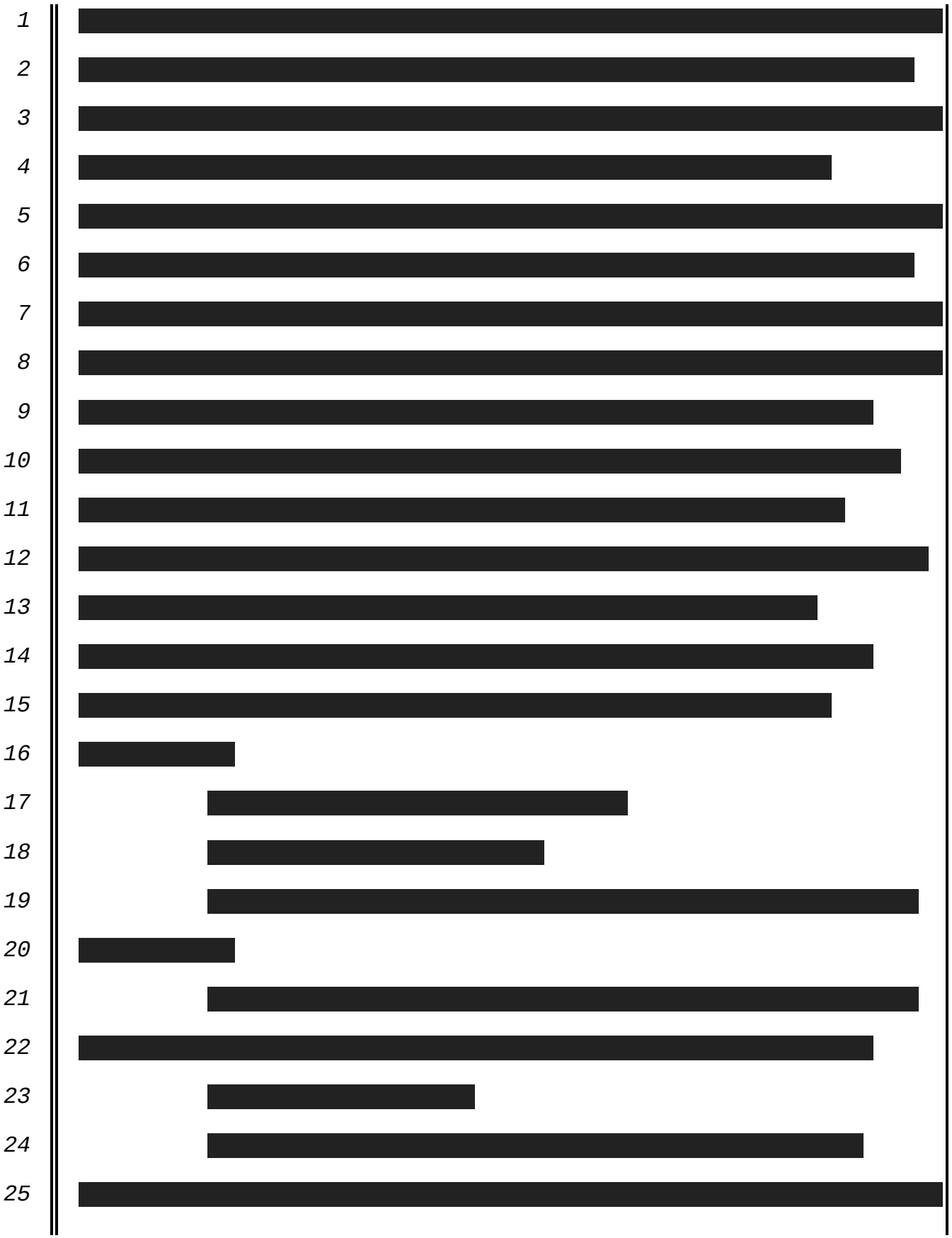

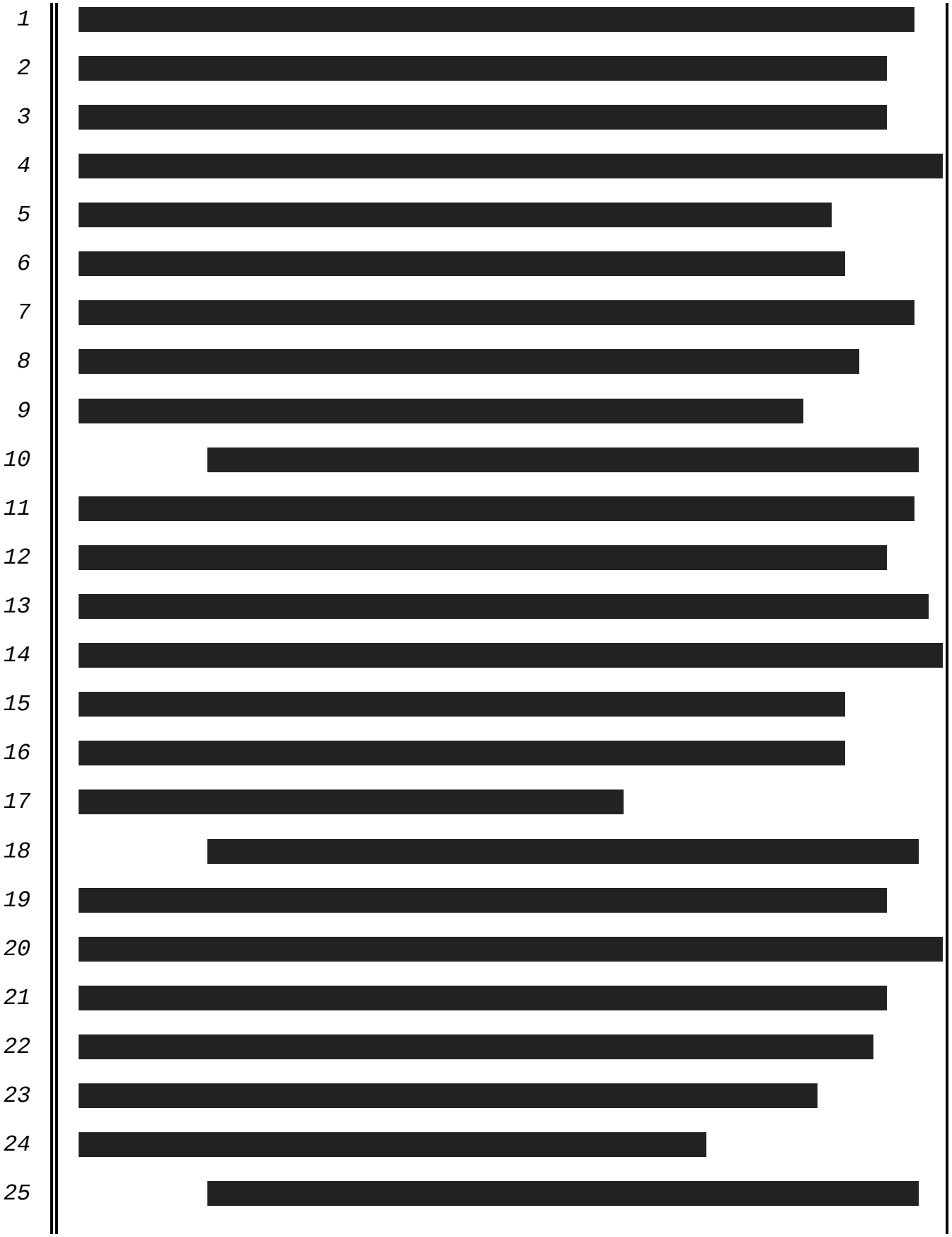

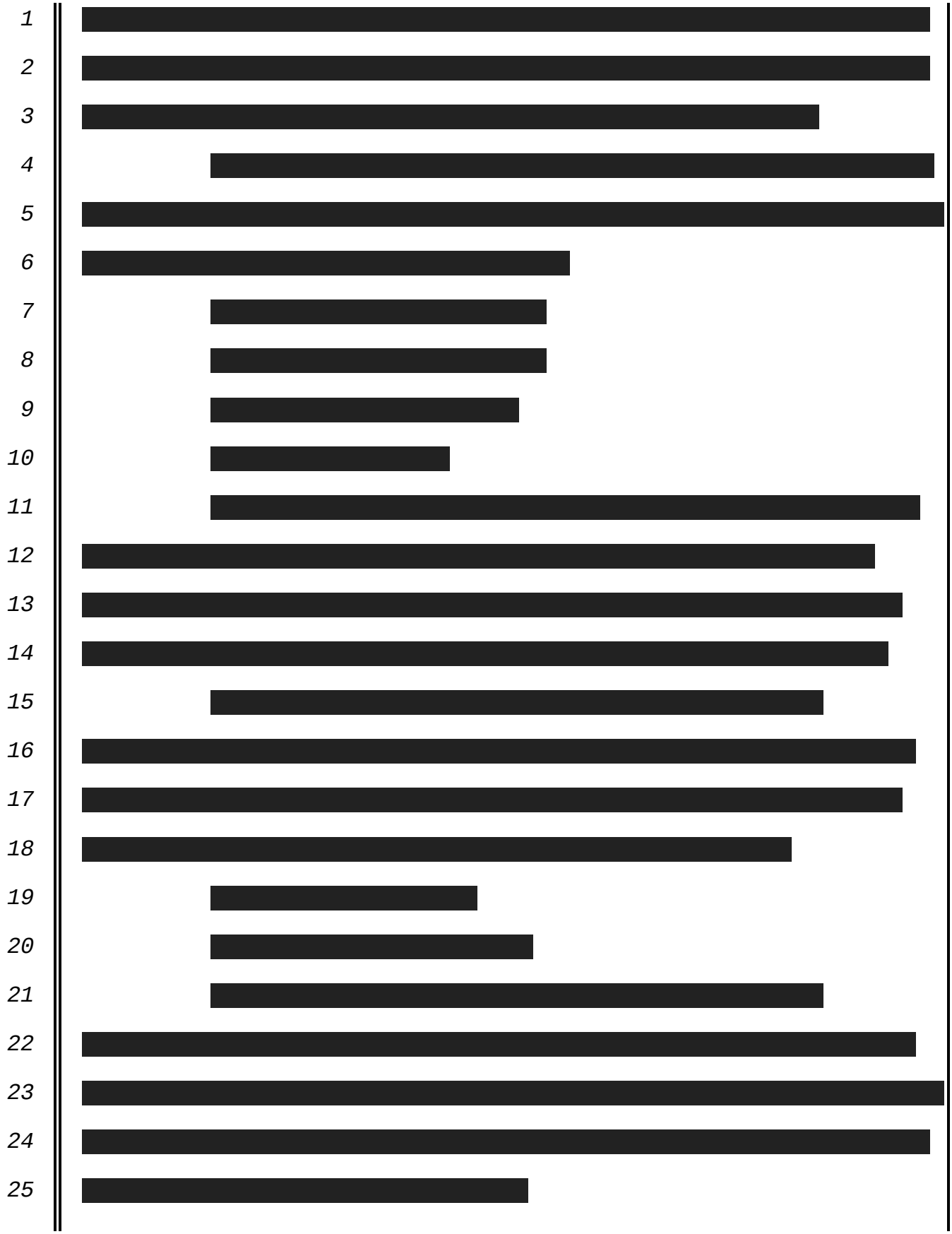

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THE COURT: All right. Thank you very much. We will see you in March.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 3:26 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Automotive Parts Antitrust Litigation, Case No. 12-2311, on Wednesday, January 25, 2017.

s/Robert L. Smith
Robert L. Smith, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 02/16/2017

Detroit, Michigan